Supreme Court, U. S.
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80-396
No.

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity
as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All Individually and in Their Official Capacity
as Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Providence, Rhode Island

Blanchard Press, Inc., Boston, Mass.—Law Printers

## QUESTIONS PRESENTED

I. Is a Municipality Liable for Punitive Damages in a Section 1983 Case?

II. Did the Cross-examination of Councilman West Exceed the Permissible Limits of the Federal Evidentiary Rules?

III. Did the Alleged Acts of the Petitioners Violate the Respondents' First and Fourteenth Amendment Rights So As To Give Rise to a Claim Pursuant to 42 U.S.C. 1983?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | I |
| Statement of the Case | 1 |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of Facts | 3 |
| Reasons for Granting the Writ | 7 |
| Argument | |
| I. A Municipality Is Not Liable for Punitive Damages in a Section 1983 Case | 8 |
| II. The Cross-examination of Councilman West Exceeded the Permissible Limits of the Federal Evidentiary Rules | 13 |
| III. The Alleged Acts of the Petitioners Did Not Violate the Respondent's First and Fourteenth Amendment Rights So As To Give Rise to a Claim Pursuant to 42 U.S.C., Section 1983 | 16 |
| Conclusion | 18 |
| Appendix A | A-1 |
| Appendix B | B-1 |


### TABLE OF CITATIONS

*Cases*


| | |
|---|---|
| *Arnett* v. *Kennedy*, 416 U.S. 135, 40 L.Ed.2d 1594 S.Ct 1633 (1974) | 17 |
| *Aumiller* v. *University of Delaware*, 434 F.Supp. 1273 (D.C. Del. 1977) | 10 |
| *Carrie* v. *Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978) | 9, 10 |
| *Chapell* v. *Springfield*, 423 S.W.2d 810, 814 (1968) | 11 |


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Page

*Cohen* v. *Franchard Corporation*, 478 F.2d 115 (2d Cir. 1973), 17 F.R. Serv. 2d 912, *cert. denied*, 414 U.S. 857, 94 S.Ct. 161, 38 L.Ed.2d 106 ..... 9

*Douglas* v. *City of Jeannette*, 219 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877 (1943) ..... 17

*First National Bank of Boston* v. *Bellotti*, 435 U.S. 745, 55 L.Ed.2d 707, 98 S.Ct. 326 (1978) ..... 17

*Fisher* v. *City of Miami*, 172 So.2d 455 (1965) ..... 12

*Luther* v. *Borden*, 7 Howard 1, 12 L.Ed. 581 (1849) ..... 12

*M'Gary* v. *President and Council of LaFayette*, 12 Rob. 674, 43 Am. Dec. 239 (1846), (La.) ..... 11

*Monnell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978) .....9, 11

*Paul* v. *Davis*, 424 U.S. 693, 47 L.Ed.2d 465, 96 S.Ct. 1155 (1976) ..... 17

*Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975) ..... 17

*Williams* v. *City of New York*, 508 F.2d 356, 362 (2d Cir. 1974) ..... 9

*Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) ..... 13

*Constitutional Provisions*

U.S. Constitution,
Amendment I .....2, 16, 17
Amendment XIV .....2, 16, 17

*Statutes*

28 U.S.C. §254(1) ..... 2
§1331 ..... 3
§1343(3) ..... 3
§§1331 and 1343(3) ..... 3
42 U.S.C. §1983 .....3, 8, 9, 10, 16

Page

Federal Rules of Civil Procedure
Rule 51 ..... 8
Federal Rules of Evidence
Rule 611(b) ..... 15
Rule 608 ..... 16
Rule 404 ..... 15
Rules of the Supreme Court
Rule 17(1)(c) ..... 7

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, The City of Newport, Mayor Humphrey J. Donnelly III, Individually and in his official capacity as Mayor, The City Council for the City of Newport and Lawrence Newsome, John H. West, Robert O. Beattie, Raymond H. Carr, Edward K. Coristine, James F. Ring all individually and in their official capacity as members of the City

Council for the City of Newport, Rhode Island, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on July 8, 1980.

## Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, as yet unreported, appears at Appendix A, *infra*, pp. A-1 to A-15. The opinion of the United States District Court for the District of Rhode Island on Petitioners' Motion for Judgment N.O.V. and a New Trial is unreported and appears at Appendix B, *infra*, pp. B-1 to B-15.

## Jurisdiction

The opinion of the United States Court of Appeals for the First Circuit was rendered on June 17, 1980 (See Appendix A, *infra*, p. A-2) and this Court's mandate was issued on July 8, 1980. This petition for a Writ of Certiorari was filed less than 90 days from either of the aforesaid dates. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Constitutional and Statutory Provisions Involved

1. First Amendment to the Constitution of the United States.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. Fourteenth Amendment to the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. Sec. 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

**Statement of Facts**

The United States District Court for the District of Rhode Island had jurisdiction of this matter by virtue of 28 U.S.C Secs. 1331 and 1343(3).

On August 22, 1975, the plaintiff, Fact Concerts, Inc. and the City of Newport entered into a contract in consideration for which the City granted to the plaintiff an entertainment license for the purpose of conducting a music concert at Fort Adams, a State owned reservation in the City of Newport, on August 30, and August 31st.

The contract provided in paragraph 2 that:

"It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interest of the public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation."

And in paragraph 7 it further provided:

"The Producer agrees to comply with all orders of the Director of Public Safety with reference to fire and police protection and safety including, but not limited to, the following:

(a) Auxiliary generator for lighting;
(b) Firefighters for fire protection and First Aid duties;
(c) Portable firefighting equipment, state area;
(d) Seating to be arranged so that aisles point near exits off the field as well as possible—all chairs to be wired together. Exits and entrances shall be provided as directed;
(e) All seats to be installed and ready for occupancy no later than 3:00 P.M. on August 29, 1975."

At the time the contract was entered into the program had been advertised in both the New York *Times* and Providence *Journal* as featuring David Brubek, Herbie Mann, Ahmad Jamal, Buddy Rich, Miles Davis, Maynard Ferguson, Sarah Vaughan and Stan Getz.

On Sunday, August 24th, two days after the Friday that the contract had been signed, an ad appeared indicating that a group named "Blood, Sweat and Tears" had been substituted for Sarah Vaughan who had cancelled her commitment to appear in Newport.

The next day Nelson Amado, one of the principals in Fact Concerts, received a call that "some problems had been raised" concerning the substitution of Blood, Sweat and Tears on the program. As a result of this call, Mr. Amado requested a meeting of the council and one was called for and held on August 26th.

The minutes of that meeting indicate that it was called to order at 11:30 A.M.; that all of the defendants were present and that "After a long discussion, pro and con, Mayor Donnelly moved that unless Blood, Sweat and Tears was removed from the bill on Sunday, the license for the contract would be cancelled by the City Council."

As a result of this meeting representatives of the plaintiffs met and decided "unanimously to abide by their decision to remove Blood, Sweat and Tears from the show and replace them."

On either Wednesday or Thursday of that same week Amado received a call from the City Solicitor advising him that Blood, Sweat and Tears would be permitted to play if they did not play rock music but rather jazz.

A second and most critical meeting was held on Friday, August 29th. The principals in Fact Concerts were present with their attorney along with members of the City Council, the City Solicitor, James O'Brien and City Manager Perry. The minutes reveal that the meeting was called to order at 4:28 P.M. and that it began with a discussion of "a possible lawsuit" and what appeared to be the offering of two alternatives to the plaintiffs; that is to say, cancellation of the concert, or the execution of an affidavit that rock music would not be played.

It is clear from the testimony of all witnesses that no such affidavit was ever executed by the plaintiffs or prepared by the defendants.

Shortly before the meeting and shortly after 3:00 P.M. on that date City Manager Perry had gone to the site of the concert at the request of the Council to determine whether or not the promoters had complied with paragraph 7 of the contract. He observed that the chairs were not wired together, but rather attached to each other by tape and there were still 500 to 1000 chairs that had not been taped. He was also unable to find the auxiliary generator which had been called for in the contract, although there is some evidence that one had been located outside the walls of Fort Adams.

According to the minutes he reported this to the Council and after some discussion a motion was made, seconded and approved unanimously to cancel the contract. The meeting was recessed at 5:05 P.M.

All of the councilmen who testified indicated that they were concerned because of earlier disturbances (in 1960, 1969 and 1971) at so-called rock concerts and that it was this concern that prompted the vote to cancel.

The meeting was reconvened at 6:25 P.M. at which time the attorney for Fact Concerts advised the Council that suit would be instituted and requested a further continuance to consult with his client. That meeting was recessed at 8:55 P.M. and reconvened at 9:27 P.M. at which time the Council was again advised that litigation would result. The meeting was adjourned.

The next day, Saturday, August 30th, the plaintiffs obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned including the appearance of Blood, Sweat and Tears on Sunday, August 31st. Approximately 6400 people attended the two-day event.

Thereafter Facts Concerts, Inc. and Marvin Lerman (one of the promoters) brought a five count complaint in the United States District Court for the District of Rhode Island seeking declaratory relief, redress for a violation of their First Amendment rights, and compensatory and punitive damages for various pendant contract claims.

At trial the complaint was reduced to two counts, the first a Section 1983 claim and the second a claim for interference with contractual relationships.

The jury answered interrogatories finding all defendants liable on both counts and awarding $72,000.00 compensatory damages and punitive damages in the total amount of $275,000.00 of which $200,000.00 was assessed against the City of Newport.

A Motion for Judgment N.O.V. and a New Trial was filed and after hearing thereon the trial justice ordered a remittitur of $125,000.00 of the punitive damage award against Newport and sustained the verdicts in all other respects.

The United States Court of Appeals for the First Circuit affirmed.

## Reasons for Granting the Writ

1. The United States Court of Appeals for the First Circuit has in the words of Rule 17(1)(c):

> "...[D]ecided an important question of federal law which has not been, but should be, settled by this Court...."

To quote the Court of Appeals:

> "Here, it is by no means certain that the court's instructions constituted error. This is an area of the law in which there has been and apparently still is, considerable movement. We have held on two occasions that punitive damages are available against Section 1983 defendants when there are aggravating circumstances. *Alicia Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (bad faith); *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968) (unwarranted invasion of privacy).
>
> Although the Supreme Court has never fully addressed the question, it has edged toward a similar conclusion. *Carlson* v. *Green*, 48 U.S. Law Wk. 4425, 4427 (April 18, 1980) (dictum); *Carrie* v. *Piphus*, 435 U.S. 247, 254-55, n.11 (1978). When our rule on this point is viewed in light of the Supreme Court's determination that municipalities are "persons" within the ambit of Section 1983, *Monnell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978); there arises a distinct possibility that municipalities, like all other persons, subject to suit under Section 1983, may be liable for punitive damages in proper circumstances. This certainly is no imposing body of law to the contrary.

> In short, the present state of the law as to municipal liability is such that we cannot with confidence predict its future course. Where the law is in such a state of flux and there is no appellate decision to the contrary, we would be hard pressed to say that the Trial Judge's punitive damages instruction was plain error. See *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). Nor is this a case containing such "peculiar circumstances (to warrant noticing error) to prevent a clear miscarriage of justice." *Numerad* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966)."

2. The United States Court of Appeals for the First Circuit in approving the District Court's sanctioning of the impermissible cross-examination of Councilman West so departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

3. The United States Court of Appeals for the First Circuit in approving the District Court's rulings regarding the defendant's motions for a Judgment N.O.V. so departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

## Argument

### I. A Municipality Is Not Liable for Punitive Damages in a Section 1983 Case.

The Trial Justice instructed the jury that they might award punitive damages against both the City of Newport and the individual defendants. Defendants' counsel failed to except to that instruction. Rule 51 of the Federal Rules of Civil Procedure would ordinarily bar further consideration of that issue. The present case is not ordinary. An Appellate Court on its own initiative may reverse on the grounds of plain error in a jury charge that was not objected to when such reversal is necessary to correct a fundamental error or to prevent a

miscarriage of justice. *Cohen* v. *Franchard Corporation*, 478 F.2d 115 (2d Cir. 1973), 17 F.R. Serv. 2d 912, *cert. denied*, 414 U.S. 857, 94 S.Ct. 161, 38 L.Ed.2d 106; *Williams* v. *City of New York*, 508 F.2d 356, 362 (2d Cir. 1974).

In *Williams* v. *City of New York*, supra, as in the present case an erroneous instruction allowed the jury to assess punitive damages against a municipality. That the innocent citizens of the City of Newport will bear the brunt of the error of court and counsel compels reconsideration of the instruction. The liability of a municipality for any damages whatsoever for alleged violations of the Civil Rights Act of 1871 was at the time of the trial a principle of law but recently created. That no developed legal doctrine regarding the issue exists both mitigates the error of the defendants' trial counsel (who is not counsel of record upon this petition) and now imperatively warrants consideration by this Court.

In *Monnell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978) this court held that municipal corporations were "persons" within the ambit of 42 U.S.C. Section 1983. The extent of and the limitations upon the liability of municipal corporations under 42 U.S.C. Section 1983 are undetermined. This court in *Monnell* expressly reserved decision on the availability of a qualified municipal immunity. Whether or not a municipal corporation or its elected members can be held liable for punitive damages is now squarely before this Court.

The main, if not the sole purpose of an award of damages under 42 U.S.C. Section 1983 is to compensate the victim for a loss resulting from the deprivation of a constitutional and protected right. To the extent that Congress intended that awards under Section 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. *Carrie* v. *Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). The great majority

of lower Federal Courts have approved the award of punitive damages against individuals found liable under 42 U.S.C. Section 1983. This Court has implied neither approval nor disapproval of those lower Federal Court decisions. *Carrie* v. *Piphus*, (supra). Assuming *arguendo* that punitive damages may be awarded against unelected individual defendants, logic and justice require that no such award be allowed against a municipal corporation or its elected representatives.

An award of punitive damages is imposed in Civil Rights actions primarily for its effects upon the wrongdoer, to punish and to deter malicious or wanton conduct in public officials. *Aumiller* v. *University of Delaware*, 434 F.Supp. 1273 (D.C. Del. 1977). An award of punitive damages against the City of Newport and its elected officials would serve neither purpose. Those who will bear the burden of the award—the taxpaying citizens—cannot realistically be charged with the responsibility for the acts of their officials nor will the citizens be able to deter further wrongful acts on the part of the officials. Members of a municipal corporation do not stand in the same position as shareholders in a private corporation against which awards of punitive damages generally are upheld. Any superficial similarity evaporates in light of analysis. Private corporations are generally created for the purpose of profit. Those who become members of them do so voluntarily and in a majority of instances, in the hope of gain. There are manifold and speedy ways by which to reach and replace any representative or agent who so mistakes or disregards his duty as to render liable for punitive damages the persons in interest represented. The municipal corporation is different. It is not organized for any purpose of gain or profit, but it is a legal creation, engaged in carrying on government and administering its details for the general good and as a matter of public necessity. The individuals who in the aggregate constitute a municipal corporation submit certain of their affairs to its control and management, but they are not volunteers in so doing. They happen to

reside within a city's boundaries and they become members of it to the extent of being represented by its agents. While theoretically a citizen has a voice in selecting a person who shall represent them and control the city, more often the government is not totally their choice, city management not in complete accordance with their individual judgment. A large body of common law decisions have held that a municipal corporation cannot be held liable for punitive damages. While the public may be benefited by such an award against the malicious wrongdoer, there is no benefit when the public is penalized for the acts of an agent over whom it is able to exercise but little direct control. *Chapell* v. *Springfield*, 423 S.W.2d 810, 814 (1968).

The award of punitive damages in the present case against the City of Newport will be borne by the innocent. Although this court has upheld an award of compensatory damages in *Monnell* v. *Department of Social Services of the City of New York*, (supra) that decision cannot be extended to encompass awards of punitive damages. An award of punitive damages is a windfall to the plaintiffs. There is no legal entitlement to punishment. Where only the innocent, oftentimes the helpless, are to bear the brunt of the punishment, the rationale supporting exemplary damages disappears. The very fact that only the innocent will be punished demonstrates that the award of punitive damages against the municipality will fail to secure its intended effect. *M'Gary* v. *President and Council of LaFayette*, 12 Rob. 674, 43 Am.Dec. 239 (1846), (La.).

There exists yet another reason to overturn the award of punitive damages against the City of Newport. What amount of money punishes a municipality? The City of Newport's power to tax is virtually unlimited. Ordinarily, the theory of punitive damages dictates that the wealthier the wrongdoer, the greater the award. A relatively small sum might be adequate to punish a poor man. A much greater sum, for the same wrong, would be needed to punish a rich man. As against a municipal corporation, this theory would permit evidence of

the unlimited taking power as the measure of a proper verdict. In effect, a jury given a license to award punitive damages against the city will be free to assess damages with no proper guidelines. *Fisher* v. *City of Miami*, 172 So.2d 455, 457 (1965). The amount of the award will be determined by the caprice of the individual jurors. Justice cannot be made a matter of chance or prejudice.

The Trial Justice found that an award of punitive damages against a municipality might serve beneficial purposes:

> "The payment of such an award necessarily serves to focus taxpayer and voter attention upon the malicious acts of the municipal government. This attention, in turn, well may have beneficial effect in the next election." (District Court of Rhode Island, 1979) (*infra*, p. B-9).

The award of punitive damages unquestionably will have an effect upon the next election. That effect will not be salutary. The punitive award against the city and its representative officials is a direct intervention by the federal judiciary into Newport's government. It is a sanction upon those duly elected representatives of Newport who have, in the court's opinion, governed badly. It is a sanction upon the citizens of Newport who have, in the court's opinion, allowed themselves to be ill governed. As early as 1849 in *Luther* v. *Borden*, 7 Howard 1, 12 L.Ed. 581 (1849), this court refused to determine sub judice which of two opposing factions was the true government of the State of Rhode Island. No court may maintain its neutrality while actively engaged in partisan politics. The punitive award in the present case, as both the parties and the Trial Justice recognized, expresses the court's disapproval of Newport's elected representatives. The punitive award endorses any political faction in opposition to the members of Newport's government as it was composed in the summer of 1975.

This direct involvement in the affairs of local politics is an intolerable abuse of the federal judicial power. The federal judiciary cannot dictate directly or indirectly to the citizens of Newport whom they must elect. The federal judiciary has long labored to assure every citizen of the United States a truly representative government. Is this Court now to punish those citizens who have in its opinion not chosen well? In *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court of the United States strongly reaffirmed its belief that the national government will fare best if the state's institutions are left free to perform their separate functions in their separate ways. While this court is bound to vindicate federal rights, that vindication must be accomplished in ways that will not unduly interfere with the legitimate activities of the state. In *Younger* v. *Harris*, (supra), this Court declared its reluctance to involve itself in state judicial proceedings. This Court must be even more reluctant to involve itself in the composition of an elected city council.

Clearly, the members of the Newport City Council and its Mayor did not foresee that their tenures in office would end in financial ruin. The award of punitive damages against individual office holders must have a chilling effect on those seeking to serve the municipality in a representative capacity. Even if the punitive award did not deter members of the council from again running for office, it would certainly not find favor with the citizens of the city who had also suffered a financial loss as a result of the award. It must be held as a matter of federal common law that a municipality and its elected officials are immune from awards of punitive damages.

## II. The Cross-examination of Councilman West Exceeded the Permissible Limits of the Federal Evidentiary Rules.

During the cross-examination of one of the defendants, John H. West, the court permitted over objections, questions deal-

ing with remarks a witness had made the day before to his fellow defendants after court had closed. The witness over objection was compelled to admit that in his opinion the case was a travesty of justice and that the closest thing to God on earth was a Judge. (Opinion of the First Circuit, *infra*, pp. A-9 - A-15). Somewhat later, the Trial Judge permitted this further line of questions:

203 Q. Is it a true statement that you thought that Mr. Weinstein from my office was ludicrous?

A. I thought that those people appeared at the eleventh hour were ludicrous, yes, sir.

204 Q. You thought that Miss Elizabeth Rode, who questioned you in this examination, was ludicrous also, is that correct?

A. Did I say that, sir?

205 Q. Did you make some remarks when you got there that you thought you were going to be deposed under oath, and that just a little girl showed up, didn't you make that remark, sir, in my office?

A. Did I?

206 Q. Did you make that remark, sir?

Mr. Faerber: I object.

The Court: No, this is legitimate cross-examination. What's the question?

207 Q. Did you make that remark, did you make that remark, sir, in my office?

A. That, sir, I don't recall making that remark, no, not unless you have it in writing, or what have you. Can you show it to me or have someone testify to it, I don't recall it, no, sir.

208 Q. If I don't have it in writing, then you don't recall having made it, is that your statement, Sir?

A. I don't recall having made it, sir. I made that clear once.

These testimonial colloquies had, of course, absolutely nothing to do with the issues to be presented to the jury. But they could not fail to have been enormously prejudicial to all the defendants.

The plaintiffs' attorney recognized this as an examination of his closing remarks to the jury shows. At least on 22 occasions he made specific references to Councilman West, virtually every reference relating to the above quoted material. Councilman West was compared with Hitler, the "Watergate Gang", and George Lincoln Rockwell. He was described as a bully and a male chauvinist.

The vice of permitting this kind of cross-examination is amply illustrated by the closing argument to the jury. The attitude of a lay person to the conduct and trial, or his personal feelings regarding the attorneys for the opposing side or the court are absolutely no assistance to the jury in reaching a decision on the merits. Mr. West's attitude towards a trial in which he was a defendant against whom some substantial money damages were sought could not possibly have a bearing on the question of his good faith in voting on the resolution of the City Council on August 29, 1975. It was accordingly prejudicial error of the greatest kind to permit the foregoing cross-examination. The Court of Appeals, *infra*, pp. A-13, found that Mr. West's credibility was fair game in light of the fact that he was not only a member of the City Council, but held himself out as an expert regarding the production of concerts. The court below does not explain, nor could it have explained, how Mr. West's attitude towards the court, the judge or the opposing attorneys was in any way probative of Mr. West's truthfulness under direct and cross-examination. Rule 404 of the Federal Rules of Evidence expressly provides that evidence of a person's character or a trait of his character is not admissible.

Rule 611(b) of the Federal Rules of Evidence expressly provides that cross-examination should be limited to the subject

matter of direct examination and matters affecting the credibility of a witness. One cannot expect a defendant in a law suit to maintain friendly or even neutral feelings to opposing counsel and to the court. It is not unnatural for a defendant to view court and counsel as the instrumentalities of his possible ruin and disgrace. Moreover, Rule 608 of the Federal Rules of Evidence expressly limits occasions when specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, may be proved by extrinsic evidence. The testimony elicited from Councilman West does not fall within the enumerated exceptions to Rule 608. It was accordingly prejudicial error of the greatest kind to permit the foregoing cross-examination.

## III. The Alleged Acts of the Petitioners Did Not Violate the Respondent's First and Fourteenth Amendment Rights So As To Give Rise to a Claim Pursuant to 42 U.S.C. Section 1983.

The Civil Rights Act of 1871, now codified as 42 U.S.C. Section 1983 is not itself a source of Substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal constitution that it describes. The first inquiry in any Section 1983 suit, therefore, is whether the plaintiff has been deprived of a right secured by the Constitution and the Laws of the United States.

The respondents in this action originally alleged that the defendants had deprived them of rights secured by the Fourteenth Amendment. Thereafter, the plaintiffs amended their complaint to allege that the acts of the defendants had deprived them of their rights pursuant to the First and Fourteenth Amendments of the Constitution.

The plaintiffs-respondents did not claim that they were unable to produce and present the concert. The concert went

on as scheduled. The injuries claimed by the plaintiffs were financial losses, lost revenues and profits and damage to their reputations. Any damage to the plaintiffs' reputations as entrepreneurs is not a wrong of constitutional dimensions. See *Paul* v. *Davis*, 424 U.S. 693, 47 L.Ed.2d 465, 96 S.Ct. 1155 (1976).

Lost profits are not "property" within the meaning of the Fourteenth Amendment. In *Arnett* v. *Kennedy*, 416 U.S. 135, 40 L.Ed.2d 1594 S.Ct. 1633 (1974), this Court reaffirmed that property interests are not created by the Constitution. Rather, such interests are created and their dimensions are defined by existing rules or understandings that stem from independent sources, such as state law. The plaintiffs' expectation of a profit arises from no contract. It was rather a hope that a commercial venture will be successful. Such hope is far too contingent to be considered a vested property interest under the meaning of the Fourteenth Amendment.

Moreover, the plaintiffs were given the process due them. They had two hearings before the City Council. The plaintiffs then successfully enjoined the defendants from interfering with the Jazz Festival. The alleged injury to the plaintiffs was solely from announcement of the cancellation of the concert.

The First Amendment is, of course, incorporated into the Fourteenth Amendment. *Douglas* v. *City of Jeannette*, 219 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877 (1943). Music is communication and song is speech. Yet, the First Amendment cannot be construed to guarantee a promoter the right to a profit. Each medium of expression must be assessed for First Amendment purposes by standards suited to it. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975). A commercial production is constitutionally protected not so much because it pertains to the promoter's business but because it furthers the societal interest in the free flow of personal expression. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 745, 55 L.Ed.2d 707, 98 S.Ct. 326 (1978).

In the instant case, every scheduled musician performed. If the plaintiffs-respondents had a right protected by the First Amendment to produce and present a concert program, that right was not abridged.

## Conclusion

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

GUY J. WELLS
GUNNING, LAFAZIA & GNYS, INC.
410 Turks Head Building
Providence, Rhode Island

APPENDIX A

# United States Court of Appeals
## For the First Circuit

No. 79-1397

FACT CONCERTS, INC. AND MARVIN LERMAN,

PLAINTIFFS-APPELLEES,

*v.*

THE CITY OF NEWPORT,
THE STATE OF RHODE ISLAND,
MAYOR HUMPHREY J. DONNELLY III,
INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS
MAYOR, THE CITY COUNCIL
FOR THE CITY OF NEWPORT AND
LAWRENCE NEWSOME
JOHN H. WEST
ROBERT O. BEATTI
RAYMOND H. CARR
EDWARD K. CORISTINE
JAMES F. RING
ALL INDIVIDUALLY AND IN THEIR OFFICIAL
CAPACITY AS MEMBERS OF THE
CITY COUNCIL FOR THE CITY OF
NEWPORT, RHODE ISLAND,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF RHODE ISLAND

[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

BEFORE COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

*Guy J. Wells*, with whom *Gunning, Lafazia & Gnys, Inc.*, was on brief, for appellants.

*Leonard Decof*, with whom *Jay S. Goodman* and *Decof, Weinstein & Mandell* were on brief, for appellees.

June 17, 1980

BOWNES, *Circuit Judge*. In August of 1975, the City Council of Newport, Rhode Island, voted to revoke a license to conduct two jazz concerts previously issued to Fact Concerts, Inc., unless the musical group Blood, Sweat and Tears was removed from the program. The City of Newport (the City) and five Newport city councillors now appeal from a jury verdict awarding compensatory and punitive damages to Fact Concerts for violation of its first amendment right to promote and produce the concerts and for interference with Fact Concerts' contractual relationships with its performers, ticket holders and concessionaires.

Appellants allege the district court erred in (1) denying the defendants' motion to dismiss, motion for a directed verdict, motion for judgment n.o.v. and motion for a new trial, (2) instructing the jury that punitive damages might be found against the City, and (3) allowing a defendant city councillor to be cross-examined concerning his knowledge of an earlier, unsuccessful attempt by the City to refuse to issue a permit for an antiwar exhibition and of out-of-court remarks made by the councillor indicating contempt for the judicial process. After reviewing these allegations in a light clouded by the defendants' failure to object at trial to several of the matters now raised on appeal, we affirm.

*The Facts*

Evidence was introduced at trial tending to show the following facts.

In the summer of 1975, Fact Concerts obtained a license from the Rhode Island Department of Natural Resources to hold a series of three concerts in Fort Adams, a large, state-owned facility located in Newport, Rhode Island. The City issued a permit for the first concert, which featured Arthur Fiedler, and the concert took place uneventfully. The two remaining concerts, originally scheduled for early August, were rescheduled for August 30th and 31st and licensed under a contract entered into with the City on August 23, 1975.

Fact Concerts prepared for the concerts throughout the summer of 1975, retaining eight well-known acts, including Sarah Vaughn, Dave Brubeck, Herbie Mann, Miles Davis and Stan Getz, to perform during the two days. Late in the summer, Sarah Vaughn cancelled her appearance because of a conflicting engagement and the group Blood, Sweat and Tears was retained to replace her. When the members of the Newport City Council learned of the addition of Blood, Sweat and Tears to the program, they became concerned that the group, which they considered a rock group rather than a jazz band, would attract an unruly audience to Newport, and initiated the efforts to force the removal of Blood, Sweat and Tears from the program which are the gravamen of this case.

On Monday, August 20th, Newport Mayor Donnelly informed Fact Concerts that he considered Blood, Sweat and Tears to be a rock group and that, because of riots the City experienced at previous rock concerts, he did not want rock groups appearing in Newport. Fact Concerts requested permission to appear at a special City Council meeting the next day.

At the special Council meeting, Fact Concerts informed the Council that, contrary to its belief, Blood, Sweat and Tears was not a rock group. Fact Concerts offered as proof of this the group's appearances at Carnegie Hall and similar facilities around the world. Mayor Donnelly, also a member of the Council, reiterated his concern as to the audience Blood, Sweat and Tears would attract. Without attempting to verify Fact Concerts' representations concerning the nature of Blood, Sweat and Tears' music, the Council voted to cancel the license for both days unless the group were removed from the Sunday program. The Council's vote received extensive publicity, a fact subsequently shown to have dampened ticket sales.

Fact Concerts acceded to the Council's wishes by cancelling Blood, Sweat and Tears and hiring a replacement group,

Weather Report. On Thursday, August 28th, Newport City Solicitor O'Brien informed Fact Concerts that the Council had changed its position and would allow Blood, Sweat and Tears to appear if they did not play rock and roll music.[1] Fact Concerts then rehired Blood, Sweat and Tears and agreed to attend another specially convened Council meeting the next day.

Mayor Donnelly opened the Friday meeting by noting the possibility of a lawsuit against the City if Blood, Sweat and Tears were not allowed to perform. He further stated that the City could either cancel the entire concert or allow Blood, Sweat and Tears to play subject to the limitation concerning rock and roll music. Although the latter option was advocated by City Solicitor O'Brien, Fact Concerts was never given the opportunity to assent to such an agreement. The cancellation option received more favorable consideration after City Manager Perry reported that Fact Concerts had failed to fulfill two provisions of its contract: installation of an auxiliary electric generator and wiring together the individual spectator seats by 3:00 p.m. Friday.[2] Finding that Fact Concerts had failed to perform its obligation under the contract, the Council voted to cancel the contract. It then offered Fact Concerts a new contract for the same dates, specifically excluding Blood, Sweat and Tears. Fact Concerts informed the City that suit

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[1] Testimony at trial tended to show that the City made this decision because Blood, Sweat and Tears had stated publicly its intention to sue the City for injury to its reputation.

[2] Testimony at trial tended to show that the auxiliary generator was in place but had been overlooked by the City Manager. There also was testimony that the chairs were fastened together by tape and that this was completed shortly after the 3:00 p.m. deadline. Testimony was offered to the effect that the special tape used on the chairs was stronger and more effective than wire and that, in any event, the chairs were in solid blocks of twelve and could not be used as weapons. The Rhode Island Department of Natural Resources testified that the preparation of Fort Adams by Fact Concerts was satisfactory for health and safety purposes.

would be instituted if the original contract were not honored. Mayor Donnelly responded by stating that the contract was cancelled because it had been breached by Fact Concerts. News of cancellation of the contract was broadcast extensively over local media that night, the eve of the concerts.

On Saturday morning, Fact Concerts obtained an injunction in state court restraining the City from interfering with the concerts. The show went on; 6,308 of a possible 14,000 tickets were sold for the two days of music, resulting in a loss of $72,910 to Fact Concerts.

*The Proceedings Below*

Fact Concerts' complaint, as amended, included five counts. Count I sought a declaratory judgment of unconstitutionality of the ordinance under which Newport licensed concerts, and injunctive relief against the enforcement of it. Count II sought compensatory and punitive damages for violation, under color of state law, of Fact Concerts' first amendment right to promote and produce a concert. Counts III, IV and V, each pendent state claims, sought compensatory and punitive damages for breach of contract, interference with contractual relationships and tortious interference with advantageous relationships, respectively. The district court found the licensing ordinance constitutional and sent Counts II and IV to the jury redesignated as Counts I and II. The jury returned verdicts on both counts for Fact Concerts, awarding compensatory damages against all defendants in the amount of $72,910 and punitive damages as follows: the City, $200,000; Mayor Donnelly and Councillor West, $20,000 each; Councillors Carr, Coristine, and Newsome, $10,000 each; Councillors Beattie and Ring, $5,000 each. Faced with a new trial on the issue of damages, Fact Concerts accepted a remittitur of $125,000 in the punitive damages award against the City.

*The Motion to Dismiss*

Defendants' motion to dismiss for failure to state a claim on which relief could be based, Fed. R. Civ. P. 12 (b), lacked

merit. As amended, Fact Concerts' complaint alleged that the defendants, acting under color of state law, intentionally interfered with Fact Concerts' first amendment right to promote and produce a concert, in violation of 42 U.S.C. § 1983.[3] Fact Concerts sought compensatory and punitive damages under both the § 1983 claim and the three pendent state law claims.

Defendants do not dispute that the first amendment, as applied to the states, *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943), protects Fact Concerts' right to produce jazz concerts. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). *See also Stepping Stone Enterprises, Ltd.* v. *Andrews*, 531 F.2d 1 (1st Cir.), *cert. denied*, 429 U.S. 823 (1976). And plaintiffs have not disputed that a municipality may deny a permit for legitimate public safety reasons, *see Stepping Stone Enterprises*, 531 F.2d at 3; *We've Carried the Rich for 200 Years Coalition* v. *City of Philadelphia*, 414 F. Supp. 611, 615 (E.D. Pa. 1976), *aff'd without published opinion*, 538 F.2d 322 (3d Cir. 1976). However, defendants deny that Fact Concerts enjoyed a constitutional right to earn a profit from the concerts. This somewhat ingenuous argument ignores the fact that section 1983 provides that violators "shall be liable . . . for redress" and that the Supreme Court has construed section 1983 to comprehend, at the least, the payment of compensatory damages. *Carey* v. *Piphus*, 435 U.S. 247, 254-57 (1978). Fact Concerts never claimed a property right in profits; it contended that the financial failure of the concerts was the result of the defendants' actions, and they were

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[3] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

liable under section 1983 for the natural consequences of their acts. We note also that, since the jury's verdict does not indicate under which counts, the 1983 count or the pendent ones, the compensatory damages were awarded, this issue may be moot.

*The Motions for a Directed Verdict and Judgment N.O.V.*

In reviewing the denial of a motion for a directed verdict, we must examine the evidence in the light most favorable to the plaintiff and determine whether there are facts and inferences reasonably drawn from those facts which lead to but one conclusion — that there is a total failure of evidence to prove the plaintiff's case. Fed. R. Civ. P. 50 (a); *Dehydrating Process Co.* v. *A.O. Smith Corp.* 292 F.2d 653, 656 (1st Cir. 1961), *cert. denied*, 368 U.S. 931 (1962). The standard of review for denial of a motion for judgment n.o.v. is the same. Fed. R. Civ. P. 50 (b); 5A Moore's Federal Practice § 50.07 [2] (1980). Fact Concerts presented evidence from which the jury could have found the following facts: that, because of the advice of the City Solicitor and the City's earlier unsuccessful attempts to refuse to issue a permit for an antiwar exhibition, the defendants were aware that the concerts could not be cancelled because of their content; that, upon learning of the addition of the group Blood, Sweat and Tears to the Sunday concert program, the defendants attempted to induce the removal of the group from the program first by persuasion and then by coercion; and that, upon learning of the possibility of a lawsuit being filed against the City for harm to the reputation of Blood, Sweat and Tears, the defendants cancelled the concert for pretextual reasons. We see no failure of evidence to prove Fact Concerts' case.

*The Motion for a New Trial*

The defendants requested a new trial on the grounds that punitive damages could not be awarded against a municipality under section 1983 and that, in any event, the size of the award of punitive damages against the City was excessive

and the result of passion or prejudice. We discuss defendants' first ground later in this opinion. The district court correctly found some merit in defendants' second ground and ordered a new trial on the issue of damages, if Fact Concerts did not accept a remittitur in the amount of $125,000 in the punitive damages award against the City. Fact Concerts accepted, thereby nearly equalizing the punitive damages awarded against the City and the individual defendants as a group. We see no reason for additional relief.

*The Cross-Examination of Councillor West*

As part of their case, defendants placed Councillor John West on the stand to testify concerning his extensive knowledge of the concert industry in general and the promotion of concerts in Newport in particular. The purpose of Councillor West's testimony was to show that defendants acted in good faith out of a reasonable concern for public safety. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). Defendants contend on appeal that the district court erred in allowing Councillor West to be cross-examined concerning his knowledge of an earlier, unsuccessful attempt by the City to refuse to issue a permit for an antiwar exhibition and out-of-court statements made by Councillor West indicating contempt for the judicial process. Although these matters have been framed by defendants to pose two different questions of law, we think they may be resolved in one analysis of their probative and prejudicial qualities.

The context of the cross-examination of Councillor West, ignored by defendants in their brief, is vital to this appeal. The district court indicated during Councillor West's direct testimony that it was having difficulty deciding plaintiff's many objections to that testimony because the direction or purpose of the testimony was unclear. After the jury had been dismissed for the day, but in the presence of Councillor West, counsel for defendants said the testimony was intended to show that "when the Council acted, whether they acted in

error, whether they acted imprudently, they did not act with malice, they did not act with intent to deprive anyone of their First Amendment rights, that they were merely exercising perhaps super caution for the safety of the public . . . ."

The next morning, prior to the resumption of Councillor Wests' direct testimony, counsel for Fact Concerts requested a bench conference at which he informed the court that, if defendants offered a good faith defense through Councillor West, he would cross-examine Councillor West on matters indicative of bad faith. Specifically, counsel for Fact Concerts said he would raise the earlier, unsuccessful effort of the Council to refuse to issue a permit for the exhibition in a city park of a "tiger cage," which opponents of the Vietnam War contended was used to incarcerate Vietnamese citizens. Counsel for Fact Concerts also said he would raise, on cross-examination of Councillor West, remarks made by him indicating contempt for the instant judicial proceeding. The court indicated such cross-examination would be permissible if a good faith defense were offered.[4] Thus, counsel for Fact

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[4] Transcript of Bench Conference

MR. DECOF: I would like to place on the record that if Mr. Faerber goes forward now with this so-called good-faith evidence I intend to examine and educe *[sic]* from this witness the fact that he was aware that the right of free speech was involved, he had previously been enjoined by this very Court as had the City Council of Newport in a prior case involving a tiger case in Eisenhower Park in Newport, that he has not only disregard but contempt for that ruling of the Court, as well as the present proceeding.

THE COURT: That's permissible cross-examination.

MR. DECOF: And that he has, let me finish, please, that he has expressed his contempt for the present proceedings in my hearing while I was at counsel table and stated to the other members of the counsel, and I quote, "This is a travesty in this court, I don't have to go to church for ten weeks, because I've been in this courtroom for a week." Another quote, "The Judge is the closest thing to God on earth." And I just want to put this on the record before I ask these questions to go into the, if we go into the state of mind of this individual with reference to good faith.

Concerts made clear that the defendants' good faith defense would be rebutted in the only way available — by showing that the defendants were aware that Fact Concerts enjoyed a constitutional right to produce a concert featuring Blood, Sweat and Tears and that the defendants intentionally interfered with that right. Moreover, counsel for Fact Concerts made clear that out-of-court statements made by Councillor West showing contempt for the legal process by which constitutional rights are protected would be raised on cross-examination.

The cross-examination went according to the prediction of counsel for Fact Concerts.[5] It was brought out that

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THE COURT: It's permissible in cross-examination.

MR. DECOF: Thank you, your Honor.

MR. FAERBER: Well, your Honor, I would simply observe that on the issue of the, I assume Mr. Decof is referring to the tiger cage issue, there was a restraining order issued in that case, he was, I believe, a member of the counsel at that time, but the case was never tried after the restraining order was issued. The tiger cage was permitted in Eisenhower Square, and the case was dismissed by stipulation.

THE COURT: I know, but you see, Mr. Faerber, you're talking now of good faith, and cross-examination can be directed to showing that there really isn't good faith.

MR. FAERBER: Yes, your Honor. Is this limited to this one individual?

THE COURT: I don't know, I can't rule now, I must rule as it develops.

(Conclusion of side bar colloquy)

[5] Transcript of Cross-Examination

Q You sat here in the courtroom yesterday while the jury was out, while his Honor stated to Mr. Faerber and in your presence that the only —

MR. FAERBER: I object to anything being stated while the jury was out, being recited before the jury.

THE COURT: Sustained.

Q You heard the discussion here to the effect that a defense that the City of Newport could raise, the only defense would be "public safety"? Didn't you, sir?

A I believe I did, yes.

Councillor West was a member of a prior City Council which had been enjoined on first amendment grounds from interfering with public exhibition of the "tiger cage." He also ad-

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Q Well, you know, don't you, sir, —

A There's also good faith.

Q You said "good faith," right?

A Right.

Q You heard these things?

A Yes, I did, but I think you have to say all statements, all things, not just the ones you want to state.

Q Mr. West, I will give you the opportunity to say every single thing you want to.

A I doubt it, sir, with you questioning me.

Q You don't like the way I question you, or you don't like what's going on in this courtroom?

A You only asked the question to which you want the answer.

Q Sir, let me ask you, with reference to the matter of free speech, you were a member of the City Council when the City Council was restrained by his Honor, Chief Judge Pettine, from limiting the right of free speech of certain people in Newport, isn't that correct, sir?

MR. FAERBER: I object.

THE COURT: Overruled.

A You must be more specific than that.

Q You don't know what I'm talking about?

A No, I don't.

Q Do you recall the event, sir, when some people wanted to demonstrate in the City of Newport over the way prisoners were being handled in the Vietnam War and they wanted to put a tiger cage on the premises at Eisenhower Park, do you remember that, sir?

A Yes, I do.

Q And you were on the City Council of the City of Newport, isn't that right?

A Yes, sir, I was.

Q And the city refused to allow that to happen?

A We refused to grant them a license, sir.

Q And they went to the Federal Court, to this very Federal Court, is that right?

A Yes, they did.

Q And before this very Chief Judge, Judge Pettine, isn't that right, sir?

mitted on cross-examination to making statements that could be interpreted as being contemptuous of the court's handling of the case.

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A Yes.

Q And he issued a restraining order, an injunction restraining the City of Newport and you, as a member of the City Council, from interfering with the right of these people to exercise free speech in the form of demonstration, isn't that right, sir?

A Slightly incorrect, he refused the rights of us not to grant them a license, which is a little bit different as far as I was concerned. They had applied for a license, we refused it, and Judge Pettine refused to allow us to refuse the license.

Q More precisely what happened is, in other words, he enjoined you people from refusing a license?

A Well, that's his opinion, sir, you can't hold me accountable for the Judge's opinions.

Q As a matter of fact, you don't have much respect for the Judge's opinion, do you, sir?

A About as much as you have.

Q I take great issue with you, sir — did you not say in open court, not in open court, but in my presence last Friday to other members of the council, "This case is a travesty"?

MR. FAERBER: I object, your Honor.

THE COURT: Overruled.

A I don't recollect, sir.

Q You don't recollect that?

A No.

Q Please be careful, Mr. West, because there are a number of people who overheard this statement. I'd like you to search your memory, did you say last Friday, I'm sorry, just yesterday, sitting at that table, to the other members of the City Council, "This case is a travesty"?

A I may have.

Q Did you also say, sir, to the other members of the City Council in my hearing, "I don't have to go to church for ten weeks, because I've been in this courtroom for a week," did you say that sir?

A I may have.

Q Well, you know you did, don't you, sir?

A I may have said those things, yes.

Q Well, did you or didn't you?

A I may have.

Q You seem to have some difficulty recalling it, didn't you say those things yesterday, sir?

We find that the admission of the testimony concerning the "tiger cage" case was probative of the Council's knowledge of the law in the area of the first amendment and, thus, bore directly on the issue of good faith.

The cross-examination concerning Councillor West's out-of-court statements, to which defense counsel objected only sporadically, was also within the limits of proper cross-examination. West, a defendant in the case, was a hostile, ascerbic witness. He testified as an expert in the production of concerts, as well as a member of the City Council. His credibility was fair game, Fed. R. Evid. 611 (b), and his attitude toward the proceedings, as reflected in voluntary statements made by him to other parties, was probative of whether his testimony would be of the objective nature expected of an expert. In these circumstances, Fact Concerts had a right to expose to the jury the remarks Councillor West made out-of-court concerning the judicial process. *See United States* v. *Kartman*, 417 F.2d 893, 897 (9th Cir. 1969). *See also United States* v. *Houghton*, 554 F.2d 1219, 1225-26 (1st Cir.), *cert. denied*, 434 U.S. 851 (1977).

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Q In the context that you present this, sir, its misdirected, my disrespect for the Judge, and if you took it that way, that's your opinion, it could have been misdirected for you, and what you're attempting to do, because —

Q But didn't you make those remarks, sir?

A Yes.

Q All right. We've got that established. We also established that it wasn't the Judge, perhaps, that you were mad at, but did you also say, sir, that the closest thing to God on earth is a Judge, did you say that, sir?

A I think that's a matter of public fact, everyone knows that, you included.

Q And didn't you say this in a derogatory manner?

A No, sir, I did not, in fact I envied Judge Pettine's position, I wish I could be him.

Q I'm sure that you do, sir — as a matter of fact, you acted as a judge in this case in refusing to permit the concert to go on.

MR. FAERBER: I object.

Q Didn't you, sir?

A That's your opinion.

*The Punitive Damages Instruction*

Defendants challenge as error the district court's instruction allowing the jury to award punitive damages against the City of Newport. Like other of defendants' allegations of error, this one is flawed by the failure to object to the charge at trial. *See* Fed. R. Civ. P. 51.[6] We may overlook a failure of this nature, *Williams* v. *City of New York*, 508 F.2d 356, 362 (2d Cir. 1974), but only where the error is plain and "has seriously affected the fairness, integrity or public reputation of a judicial proceeding." *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976) *quoting* 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2558 at 675 (1971).

Here, it is by no means certain that the court's instructions constituted error. This is an area of the law in which there has been and apparently still is, considerable movement. We have held on two occasions that punitive damages are available against section 1983 defendants when there are aggravating circumstances. *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (bad faith); *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968) (unwarranted invasion of privacy). Although the Supreme Court has never fully addressed the question, it has edged toward a similar conclusion. *Carlson* v. *Green*, 48 U.S.L.W. 4425, 4427 (April 18, 1980) (dictum); *Carey* v. *Piphus*, 435 U.S. 247, 254-55 n.11 (1978). When our rule on this point is viewed in

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[6] Rule 51 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

light of the Supreme Court's determination that municipalities are "persons" within the ambit of section 1983, *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), there arises a distinct possibility that municipalities, like all other persons subject to suit under section 1983, may be liable for punitive damages in the proper circumstances. There certainly is no imposing body of law to the contrary.

In short, the present state of the law as to municipal liability is such that we cannot with confidence predict its future course. Where the law is in such a state of flux and there is no appellate decision to the contrary, we would be hard-pressed to say that the trial judge's punitive damages instruction was plain error. *See United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). Nor is this a case containing such "peculiar circumstances [to warrant noticing error] to prevent a clear miscarriage of justice." *Nimrod* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966).

*Affirmed.*

# APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

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Civil Action No. 76-0071

FACT CONCERTS, INC., et al.

*v.*

CITY OF NEWPORT, et al.

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## OPINION AND ORDER

PETTINE, *Chief Judge.* On August 29, 1975, the City Council of Newport, Rhode Island voted to prohibit the band "Blood, Sweat and Tears" from performing at a Newport jazz concert. The case was tried to a jury at which time testimony was presented in support of the plaintiffs' claim of discriminatory conduct by the City Council due to the musical content of the proposed concert; this was evident in the council's minutes reciting as the reason for the prohibition the band's rock music. At the same time, the defendants denied any wrong doing, claiming that they acted to preserve the public's safety and well being and further that the promoters had failed to comply with certain contract conditions.

The jury was not convinced by the defendants' varied explanations. They found that the defendants, who consisted of the City of Newport, the mayor, and the members of the city council had denied the license on the basis of the content of the group's music—so called "rock" music—and, thereby, violated the clearly established first amendment rights of the plaintiffs/promoters. The jury also found that this denial and the subsequent actions and statements of the mayor constituted tortious interference with plaintiffs' contracts with the band, ticket holders and various concessionaires.

After being instructed on 42 U.S.C. §1983, the "good faith" defense, and state tort law, the jury returned verdicts against

all the defendants on both counts. They awarded compensatory damages in the amount of $72,910.00 against the City of Newport and all the individually named defendants; and punitive damages as follows: City of Newport—$200,000.00; Mayor Humphrey J. Donnelley, III—$20,000.00; John H. West—$20,000.00; Robert O. Beattie—$5,000.00; Raymond H. Carr—$10,000.00; Edward K. Coristine—$5,000.00; James F. Ring—$5,000.00 and Lawrence Newsome—$10,000.00. Seventy-five percent of the total punitive award as to each defendant was assessed against Count I (First Amendment claim) with twenty-five percent as against Count II (state claim).

Defendants now move for judgment notwithstanding the verdict (Fed.R.Civ.P. 50) and for a new trial (Fed.R.Civ.P. 59). These motions are discussed separately.

JUDGMENT NOTWITHSTANDING THE VERDICT

A judgment notwithstanding the verdict is only appropriate if the Court determines that:

> when all the evidence is considered together with all reasonable inferences to be drawn therefrom most favorable to the plaintiff there is a total failure or lack of evidence to prove the necessary element of the plaintiffs' case.

*Marchant* v. *American Airlines*, 146 F.supp. 612, 614 (D.R.I. 1956), *aff'd*, 249 F.2d 612 (1st Cir. 1957).

Defendants demand a judgment n.o.v. and assert that this Court's instructions on the law were erroneous. Defendants allege that legal error infested nearly every aspect of the Court's jury charge, including the description of both state and federal substantive offenses, the immunity instruction, and the punitive damage instruction.

None of these legal arguments were ever raised at trial. In fact, the defendants failed to request that any of their current legal interpretations be inserted into the jury instructions and

never objected to any aspect of that charge before or after the jury retired. Defendants appear to forget that Fed.R.Civ.P. 51 clearly provides that:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Therefore, defendants' untimely objections are not the proper basis for this post-trial motion.

Although the policies of fairness and economy which Rule 51 incorporates are vital, *see, e,g., Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976), this Court does not rest its decision on this procedural ground alone. Defendants' substantive legal arguments do not constitute a sufficient basis for granting a motion for judgment n.o.v.

A. Legislative Immunity

1. *Section 1983 Claim*

The recent Supreme Court case of *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency*, 47 U.S.L.W. 4256 (U.S. Mar. 5, 1979) held that federal, state, and regional legislators may claim absolute legislative immunity from federal damage liability when they are acting in their legislative capacities. Although the Supreme Court did not directly address the issue, *id.* n. 26, much of the Court's reasoning may logically extend the absolute legislative immunity to municipal legislators. The defendant councilmen, therefore, assert that, as elected municipal legislators, they are immune from this federal damage action.

The defendants' reasoning overlooks one critical element of the argument: to qualify for absolute legislative immunity, the official must be acting in his legislative capacity. The fact that city councilmen are elected officials with several legislative duties cannot shield them totally from federal damage liability. The absolute immunity announced in *Lake County Estates* pertains only to legislative acts; the immunity is not

dependent upon one's particular position or title in government, but upon the particular functions one is performing at the time. *Id.* at 4260. *See also Butz* v. *Economou*, 438 U.S. 478 (1978).

What constitutes a legislative act is not always a simple question to resolve. This Court confidently concludes, however, that the councilmens' denial of the license does not fall within the spectrum of legislative activity, rather such an act must be classified as administrative. The debate, deliberation, investigation and drafting of statutes and ordinances are plainly legislative functions. *See Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Powell* v. *McCormack*, 395 U.S. 486, 501-06 (1969). In contrast to the formulation and passage of broadly applicable rules and regulations, the ad hoc enforcement of such regulations to a particular individual is an administrative function. *See, e.g., Freitag* v. *Carter*, 489 F.2d 1377 (7th Cir. 1973) (denial of chauffeur's license). *Cf. BiMettalic Investment Co.* v. *Colorado*, 239 U.S. 441 (1915) (formulating generally applicable standard in rulemaking, particular application of that standard is adjudication). *See generally* H. Hart & A. Sax, Materials on the Legal Process, 717-23, 1092-1100 (tent. ed. 1958). In this case, the council applied the state licensing and town ordinance to this particular request for an entertainment license. Such ad hoc licensing decisions are uniformly considered administrative acts and not immune from section 1983 liability. *See, e.g., Cordeco* v. *Santiago Vazquez*, 539 F.2d 256 (1st Cir. 1976), *cert. denied*, 429 U.S. 978 (1976) (denial of license to extract sand); *Tollett* v. *Laman*, 497 F.2d 1231 (8th Cir. 1974), *cert. denied*, 419 U.S. 1088 (1974). Absolute immunity does not extend to such administrative acts because judicial review of the motives behind the individualized application of the law is critical and does not involve or impede the unfettered deliberations and occasional rough-and-tumble debate of a free functioning political and legislative system. *Compare Tenney* v. *Brandhove, supra* at 377-78 with *Wood* v. *Strickland*, 420 U.S. 308 (1975).

For such administrative actions, the council members were still entitled to the "good faith" immunity set forth in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) and *Wood* v. *Strickland*, *supra*. *See Cordeco* v. *Santiago Vazquez*, *supra*. A description of this qualified immunity was fully detailed in the jury charge.

The Mayor of Newport cannot complain of the qualified immunity instruction. As mayor, he was acting in an executive role and only entitled to the "good faith" immunity instruction contained in the jury charge. *Scheuer* v. *Rhodes*, *supra*.

2. *State Claim*

Defendants also claim an absolute legislative immunity to the state tort claim of interference with contractual relations. The Rhode Island Supreme Court has not decided the extent of the governmental immunity for the executive and administrative acts involved in this case; however, one may confidently conclude that the state Supreme Court would not hold administrative acts privileged to an absolute immunity. In *Calhoun* v. *City of Providence*, 390 A.2d 350 (1978), the Rhode Island Supreme Court reaffirmed the existence of absolute judicial immunity but only after carefully considering the competing societal interests:

> There must be a weighing of the injured party's demand for justice against the state's equally valid claim to exercise certain powers for the good of all without the burdensome encumbrances and disruptive forces.

Id. at 355. The Rhode Island Court indicated that such a weighing process might recommend "judicial, prosecutorial and legislative immunities"; no mention was made of any absolute administrative or executive immunity. Undoubtedly, the Rhode Island Supreme Court was aware that the United States Supreme Court recently had engaged in an identical weighing process and concluded that those exercising executive and administrative functions deserved only a qualified good faith immunity from federal liability. *Scheuer* v.

*Rhodes, supra; Wood* v. *Strickland, supra.* In the absence of any contrary indication from the Rhode Island Supreme Court, the careful and convincing analyses contained in *Scheuer* and *Wood* provide this Court with a firm guideline. The jury charge carefully followed those two Supreme Court decisions; the defendants cannot request more.

B. Substantive Causes of Action

1. *Claim under Section 1983*

Defendants seek judgment n.o.v. on the ground that plaintiffs have failed to state a cause of action. They argue that, as promoters, plaintiffs suffered no infringement of their own first amendment rights and can claim no derivative or vicarious ability to assert the band's right of artistic expression. Defendants' argument is unsupportable. Cases such as *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975) directly hold that one has a first amendment right to promote and produce a musical production. *See also Stepping Stone Enterprises, Ltd.* v. *Andrews,* 531 F.2d (1st Cir. 1976). Section 1983 is the appropriate vehicle for plaintiffs to utilize in asserting this first amendment right.

2. *Claim of Tortious Interference with Contractual Relations.*

Plaintiffs' pendent state law claim is equally legitimate. The plaintiffs alleged and submitted evidence showing that the defendants maliciously interfered with plaintiffs' existing contracts. The jury found that defendants did indeed intentionally interfere with the plaintiffs' already consummated contracts with the band, with various concessionaires, and with numerous ticketholders. Such interference constitutes an actionable tort in Rhode Island. *See Local Dairymen's Assoc., Inc.* v. *Potvin,* 54 R.I. 430 (1934); *Smith Development Corp.* v. *Bilow,* 112 R.I. 203 (1973). A judgment n.o.v. on this valid state law claim plainly is inappropriate.

MOTION FOR NEW TRIAL

Defendants argue that even if the finding of liability was correct, the size of the punitive awards are clearly excessive, inappropriate and constitute grounds for a new trial. Fed.R.Civ.P. 59. First, defendants assert that punitive damages cannot be awarded, in any amount, against a municipality under 42 U.S.C. §1983. Second, they argue that the punitive awards were excessive and the result of passion or prejudice. The Court cannot agree with the first contention, but is partially persuaded by the second.

The massive punitive damage award of $200,000.00 against the City of Newport is particularly troublesome. Again, defendants failed to object, in a timely fashion, to the jury instruction holding municipalities liable for punitive damages. Despite defendants' tardiness, a careful resolution of this novel question is critical to a just verdict in this case.

In holding that municipalities can be sued directly for monetary damages under section 1983, the Supreme Court left undecided whether punitive damages were legally permissible. *Monell* v. *Department of Social Services*, 97 S.Ct. 2018, 2035-36 (1978). The remaining contours of section 1983 liability were left to be sketched by the lower federal courts. The question of whether or not a municipal corporation can be held liable for punitive damages is now squarely before this court.

This question requires the Court to tread upon relatively virgin territory. The language and legislative history of section 1983 provide little aid in determining whether municipalities should be held open to punitive liability. The *Monell* case does speak in broad terms: local governments can be sued directly for "monetary" relief "like every other §1983 'person'." *Id.* at 2035-36. This broad language, however, was not in reference to the novel issue of punitive liability for municipalities. The contours of such punitive liability can only be determined by a careful balancing of factors and by analogizing from prior federal case law.

As a matter of general principle, punitive damages are permissible in section 1983 actions. *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir), *cert. denied*, 393 U.S. 940 (1968); *Basista* v. *Weir*, 340 F.2d 74 (3d Cir. 1965). The primary purpose behind section 1983 punitive damages is future deterrence; thus, punitive awards are most appropriate when there has been a showing of a pattern of illegal conduct or malicious and willful acts that may be deterred in the future by the example of a punitive award. *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Aumiller* v. *University of Delaware*, 434 F.Supp. 1273 (D.C. Del. 1977).

Defendants argue that punitive damages should not be awarded against a city because such an award only results in punishing the innocent taxpayer. As the Supreme Court of Missouri reasoned:

> One of the principal reasons advanced by the courts why punitive damages should not be recoverable against a municipality...is that since punishment is the objective, the people who would bear the burden of the punishment—the taxpaying citizens—are the same group who are supposed to benefit from the public example which the punishment makes of the wrongdoer.

*Chapell* v. *Springfield*, 423 S.W.2d 810, 814 (1968).[1] Such

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[1] The majority of the state courts follow the Missouri approach and hold that, in the absence of statutory authority, punitive damages may not be recovered against a municipality. *See, e.g., Herilla* v. *Mayor & City Council of Baltimore*, 37 Md. 481 (1977); *Hutchinson* v. *Lott*, 110 So.2d 421 (Fla. 1959); *Moody* v. *City of Galveston*, 524 S.W.2d 583 (Tex.); *M'Gary* v. *President & Council of La Fayette*, 12 Rob. 674 (La. 1846). Some states, however, have begun to hold municipalities punitively liable for reckless or intentional deprivations. *See, e.g., Henningan* v. *Atlantic Refining Co.*, 282 F.Supp. 667 (E.D. Pa.), aff'd 400 F.2d 857 (3d Cir. 1968); *Minneapolis* v. *Richardson*, 307 Minn. 80 (1976); *Governale* v. *City of Owosso*, 59 Mich. App. 745 (1975); *Hayes* v. *State*, 80 Misc. 2d 498,

reasoning serves as salutary advice and provides any court reason to pause before awarding punitive damages against a municipality.

In some circumstances, however, a punitive award against a municipality may serve beneficial purposes. The payment of such an award necessarily serves to focus taxpayer and voter attention upon the malicious acts of the municipal government. This attention, in turn, well may have a beneficial effect in the next election. To characterize the municipality's voters and taxpayers as innocent victims of a punitive award does not comport with our theory of representative democracy; each voter/taxpayer is responsible, of course, for the election and formation of a government that will uphold and defend the Constitution. This responsibility is the essence of representative government. It bears repeating that the government of the United States stems from the people. The wrongs of the government, even if it betrays the electorate, are theoretically the wrongs of the people; the people may always exorcise those wrongs through the democratic process. The votes of the electorate, stirred by their pocketbooks, constitute one of the strongest corrective forces in American law. Therefore it should come as no surprise that federal courts have indicated a willingness, in other contexts, to hold cities liable for punitive damages. *See Fulton Market Cold Storage* v. *Cullerton*, 582 F.2d 1071, 1073 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3483 (No. 78-748, Jan. 16, 1979); *Hanna* v. *Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975); *Patterson* v.

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363 N.Y.S. 2d 486 (Ct. Cl.), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S. 2d 647 (1975).

Defendants do not assert that municipalities cannot be held liable for punitive damages under Rhode Island law; instead, their attack appears confined to federal law. It is sufficient to note that Rhode Island has no statutory or case law prohibiting such an award. Therefore, the Court sees no reason to raise this difficult state law question *sua sponte*. Instead, we leave the question for the state courts to deal with on another day.

*City of Chester*, 389 F.Supp. 1095-96 (E.D. Pa. 1975). There is no reason that courts should not cautiously pursue this policy in the area of section 1983.

Although a municipality may be held liable for punitive damages, am analysis of the facts of this case convince this Court that the punitive award of $200,000.00 against the City of Newport is excessive, against the weight of the evidence, and fails to comport with substantial justice.

The jury's verdict, of course, is entitled to great deference; the jury is the fact finding body that must weigh the evidence, the inferences, the witnesses' credibility and determine damages on the basis of that weighing process. "Courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Marchant* v. *American Airlines*, 146 F.Supp. 612, 615 (D.R.I. 1956), *quoting Tennat* v. *Peoria & P.U.R.R.*, 321 U.S. 29, 35 (1944) (citations omitted). A federal court should never interfere with the jury's damage award unless "it is quite clear that the jury has reached a seriously erroneous result." 6A J. Moore, Federal Practice, 59.08[5], at 160 (1974). The punitive award against the City was such a "seriously erroneous result"; the sum was both unreasonable and devoid of firm support in the record.[2] In these circumstances it is

[2] The jury may have granted this excessive punitive award without a firm evidentiary basis; but, there is no reason to believe that the award was the result of passion or prejudice that infected the entire trial. *See generally* C. Wright & A. Miller, Federal Practice and Procedure, §2807, p. 103 (completely new trial must be granted "if the verdict was the result of passion and prejudice, since prejudice may have infected the decision of the jury on liability as well as on damages.") At no point during the trial did either side attempt to provoke any illegitimate passions or particular fact pattern or personality that made a verdict infected by passion or prejudice from the jury. Nor was there any particular fact pattern or personality that made a verdict infected by passion or prejudice a

appropriate for a court to order a remittitur and direct that if the plaintiff refuses to accept it, there be a new trial pursuant to Fed.R.Civ.P. 59. *See Occidental Life Ins. Co. of North Carolina* v. *Pat Ryan & Associates, Inc.*, 496 F.2d 1255 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Holmes* v. *Wack*, 464 F.2d 86 (10th Cir. 1972). *See generally* C. Wright & A. Miller, Federal Practice and Procedure §2807.

The wrong complained of in this case was not a policy or ordinance traditionally adhered to by various municipal administrators, instead the unconstitutional permit denial was an isolated, intentional act by several council members and the mayor. The evidence certainly supports the punitive damage awards granted against the individual councilmen and mayor. There was evidence showing that the city council, despite the City Solicitor's legal advice that such a denial would be unconstitutional voted to deny the license. Evidence also revealed that the City Council members attempted to avoid the responsibility for their actions by offering varied and ever changing reasons for their actions. The jury could easily find that some of the council members lacked credibility, particularly those members who altered their testimony, and who remained resolute in their own peculiar interpretation of the Constitution. This evidence strongly supports the various punitive sums awarded against the individuals. These individual sums ranged between five and twenty thousand dollars and totalled an impressive $75,000.00.[3] Considering

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likelihood. As for the differing damage awards against the individual councilmen, these appear to be roughly equated with their individual culpability. These differing awards cannot be considered erroneous or the result of prejudice. *See* n. 3 *infra*.

[3] The fact that the jury awarded different sums against the various individuals cannot be considered error. The jury is to weigh the actions of each individual and award damages accordingly. In deciding the amount of punitive damages, the jury was entitled to consider not just the unanimous vote of the City Council to revoke the license, but also the various explanations that each councilor

how the trial focused upon these individual's foreknowledge, conduct and changing testimony, these punitive damages cannot be considered unreasonably high. *See Aumiller* v. *Univ. of Delaware*, 434 F.Supp. at 1311. Likewise, because the city acts through its councilmen, it could be held punitively liable.

The $200,000.00 award against the City, however, is completely extravagant. As stated, the City, of course, acts through its councilmen; but, there was no substantial evidence that the City was peculiarly guilty of the alleged constitutional violation. The wrong complained of in this case was not a policy or ordinance traditionally adhered to by various municipal administrators; instead, the unconstitutional permit deprival was an isolated, intentional act by several council members and the mayor. The wrong could be, and was, pinpointed at specific individuals as the primary wrongdoers. Logic dictates that they shoulder a major portion of the punitive award.

To prevent future violations of the first amendment, the jury apparently felt that a punitive award against the City was necessary. Even if the City is to shoulder some punitive award, there is no evidence to show that the City should be assessed disproportionate punitive damages. The facts of this case indicate that the City should be treated simply as another individual defendant; there are no facts to suggest that the City should become the repository for the great bulk of the punitive damage award. The sole fact that a city is never judgment proof cannot prove a basis for extreme punitive awards. Theoretically, a city always can raise its taxes and afford any punitive award; yet, this hardly comports with a fair system of justice that roughly proportions damages to the facts of the case.

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gave for doing so, as well as their demeanor and credibility while certifying. As the Seventh Circuit noted "the appropriate consideration in deciding the issue of punitive damages is the motive and attitude of the defendants...." *Jeanty* v. *McKey & Pogue, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974).

Reviewing the evidence against the sensitive backdrop of municipal liability convinces this Court that a remittitur or a new trial on damages must be ordered. When a verdict is excessive in light of the facts, it is settled law that the plaintiff may opt for the court determined remittitur or submit to a new trial on damages. *Blunt* v. *Little*, 3 Fed. Cases 760 (C.C.D. Mass. 1822) (No. 1578) (Storey, J.); *Gorsalitz* v. *Olin Mathieson Chem. Corp.*, 429 F.2d 1033 (5th Cir. 1970). *See Dimick* v. *Schiedt*, 293 U.S. 474 (1935). The remittitur this Court would award should constitute the maximum permissible punitive award that a jury properly could award on the facts of this case. *See Dimick* v. *Schiedt*, 293 U.S. at 486. *See also* C. Wright & A. Miller, Federal Practice and Procedure §2815, p. 104. The maximum permissible punitive award on the facts of this case cannot logically exceed the total punitive sum awarded against the individual councilmen and mayor. The City, in this case, only acted through its elected officials. The City's guilt can be no greater than the collective guilt of its officials. Thus, it can only be liable to the same extent as those elected officials. Considering the punitive sums awarded against the other individuals in this case, $75,000.00 appears the maximum permissible punitive award for the City. The plaintiff is free to accept or reject this remittitur sum. If the remittitur is rejected, the motion for new trial on damages will be granted.

The plaintiffs will advise the Court of its decision.

By Order,
(s) KATHLEEN M. LYNCH
*Deputy Clerk*

Enter:
(s) RAYMOND J. PETTINE
*Chief Judge*
July 2, 1979

80-396
No. 80-133

# In the Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## JOINT APPENDIX


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PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1980
CERTIORARI GRANTED DECEMBER 15, 1980

## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| Docket Entries | | 1 |
| Complaint | | 8 |
| Answer | | 13 |
| Motion To Dismiss | | 16 |
| Objection to Motion To Dismiss | | 18 |
| Order, April 24, 1978 | | 19 |
| Amended Complaint | | 20 |
| Answer to Amended Complaint | | 30 |
| Stenographic Transcript of Trial | | |
| Testimony of: | | |
| Donnelly, | Direct | 34 |
| West, | Direct | 38 |
| | Cross | 40 |
| Coristine, | Cross | 40 |
| Carr, | Direct | 42 |
| James F. Ring, | Direct | 43 |
| Newsome, | Direct | 45 |
| | Cross | 48 |
| Jury Charge | | 49 |
| Exhibit No. 1 | | 63 |
| Exhibit No. 2 | | 64 |
| Defendant's Motion for Judgment N.O.V. or in the Alternative for a New Trial | | 67 |
| Remittitur | | 68 |
| Appendix to Petition for Writ of Certiorari: | | |
| Opinion of the United States Court of Appeals for the First Circuit, Dated June 17, 1980 | | A-1 |
| Opinion and Order of the United States District Court for the District of Rhode Island, Dated July 2, 1979 | | B-1 |

GENERAL DOCKET

# United States Court of Appeals
## For the First Circuit

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Case No. 79-1397

FACT CONCERTS, INC., ET AL.

*v.*

THE CITY OF NEWPORT, ET AL.

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DOCKET ENTRIES

| 1979 | | FILINGS—PROCEEDINGS |
|---|---|---|
| Aug. | 13 | Copy of district court docket entries and notice of appeal received and filed and case docketed. |
| Aug. | 13 | Record on appeal received and filed. Notices sent. |
| Aug. | 17 | Motion filed. Order (Coffin, Ch.J.) Upon motion of appellants in case number 79-1397 and the representation that the transcript will not be completed until October 10, 1979, it is ordered that the time for filing the statement of issues and designation be enlarged to October 22, 1979 and the time for filing the briefs and appendix be enlarged to November 21, 1979. Notices mailed. |
| Aug. | 20 | Appearance of Guy J. Wells, Esquire for appellant received and filed. |
| Aug. | 30 | Appearance of Leonard Decof, Esquire for appellee received and filed. |
| Oct. | 19 | Motion filed. Order (Bownes, J.) enlarging time for filing statement and designation to November 19, 1979, and enlarging time for filing appendix and brief for appellants to December 20, 1979. Notices mailed. [gvc] |
| Nov. | 15 | Supplemental record on appeal received and filed. (mn) |
| Nov. | 16 | Supplemental certificate consisting of two volumes of transcripts received and filed [jc] |

1979 FILINGS—PROCEEDINGS

Nov. 19 Appellants' designation of contents of appendix and their statement of issues received and filed. (mn)

Dec. 3 Appellees' counterdesignation of contents of appendix received and filed.

Dec. 20 Brief for appellents and appendix (3 Vols.) and Exhibits received and filed. Notices mailed. (mn)

Dec. 21 Motion filed. Order (Campbell, J.) enlarging the time for appellees to file their brief to and including January 24, 1980. Notices mailed. [jc]

1980 FILINGS—PROCEEDINGS

Jan. 24 Brief for appellee received and filed. (mn)

Jan. 25 Assigned for hearing at the February, 1980 session in Boston. [jc]

Feb. 1 Heard before Coffin, Ch.J., Campbell & Bownes, J.J. [jc]

Feb. 6 Supplement to Defendant-Appellants brief received and filed. (cb)

Feb. 6 Appellees' supplemental memorandum received and filed. (mn)

June 17 JUDGMENT: The judgment of the district court is affirmed. Opinion of the Court by Bownes, Circuit Judge. Notices mailed. [jc]

July 8 Mandate issued, copy filed. Taxation filed. Original papers returned to the district court. Notices mailed. 'jc]

Sept. 22 Notice of filing petition for certiorari (80-396) September 12, 1980.

Dec. 18 Order of Supreme Court granting certiorari (80-396) Dec. 15, 1980. [lam]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

## DOCKET ENTRIES

| 1976 | | PROCEEDINGS |
|---|---|---|
| Mar. | 1 | Complaint filed with appearance of Leonard Decof, Esq. Summons issued returnable within 20 days after service. F. |
| | 5 | 9 Summonses returned duly served and filed. /i |
| | 24 | Appearance of James S. O'Brien, City Solicitor and Frederick W. Faerber, Jr., Assistant City Solicitor for Deft's filed. (j) |
| | | Deft's Motion to Dismiss filed together with affidavit of Robert A. Shea. |
| Apr. | 16 | Pltff's, Facts Concert, Inc. & Marvin Lerman objection to motion to dismiss filed. |
| Apr. | 24 | Order re: Regrettably the Mot to Dismiss has been pending an inordinate amount of time due to the unfortunate delay in appointing a judge to fill a vacancy that existed. The Court does not wish counsel to conclude the matter is now being treated summarily in order to expedite a ruling and not have further delays attendant the preparation of the opinion, it suffices to say, full study has been given to the memo filed. I conclude the mot to dismiss must be denied and entered and filed. h |
| May | 8 | Defts' Answer filed. kml |
| June | 21 | Preliminary pretrial Order—discovery closed by November 1, 1978 on and after November 6, 1978. l |
| Nov. | 3 | Notice to take deposition of Edward Coristine. h |
| | 3 | Notice to take deposition of John West. |
| | 3 | Notice to take deposition of Humphrey J. Donnelly, III. h |

1976 PROCEEDINGS

Nov. 7 Pltff's motion for ext. of time to Nov. 13 to file pretrial memo.
7 3 deposition subpoenas returned.
7 Pltffs' amended notice to take deposition of John H. West. l
8 Motion for extension of time to file pretrial memo is granted to Nov. 13, 1978.
Nov. 13 Pltff's Motion for extension of time for filing pretrial memo to Nov. 17, 1978. h
16 Notice to take deposition of Lawrence E. Newsome. h
16 Notice to take deposition of Rayumond H. Carr. h
16 Notice to take deposition of James F. Ring. h
16 Notice to take deposition of Robert O. Beattie. h
17 Pltff's motion for an amended complaint. l
20 Pltff's pretrial memo received. l
29 Pltffs' Motion to amend complaint, no objection having been timely filed is granted. h
29 Pltffs' Amended complaint. h
30 Amended notice to take deposition of Robert O. Beattie. h
30 Amended notice to take deposition of James F. Ring. h
30 Amended Notice to take deposition of Raymond H. Carr. h
30 Amended Notice to take deposition of Lawrence E. Newsome. h
30 Amended notice to take deposition of John H. West. h
Dec. 13 Defts' answer to amended complaint. l
Dec. 15 Defts' pretrial memo received and brought into chambers. l

| 1979 | | PROCEEDINGS |
|---|---|---|
| Jan. | 9 | JURY IMPANELLED. L |
| | 10 | Pltffs' notice to take deposition of Richard Zimmer. 1 |
| | 16 | 1ST DAY OF TRIAL—Marvin Lerman sworn; Pltff exhibits 1-17. 1 |
| | 17 | 2 civil subpoenas returned. 1 |
| Jan. | 17 | 2nd day of trial—Richard Zimmer, Dennis J Murphy sworn; Pltff exhibits 19, 20, 18. 1 |
| | 18 | 3rd day of trial—Frank N. Amada, Albert Costa, Mayor Humphrey J. Donnelly sworn—Pltff. exhibits 21-24. 1 |
| | 22 | 4th day of trial—Jarcho, John H. West, Seymour Ladd sworn; exhibits 25-26. 1 |
| | 23 | 5th day of trial—Chief of Police Perry sworn and John West recalled. Deft's exhibit A. 1 |
| | 24 | 6th day of trial—John West resumes stand, Edward Coristein, Raymond H. Carr, James P. Ring, Lawrence E. Newsome sworn—Deft Exhibit B. Deft rests. Deft's motion for directed verdict is denied (oral motion) Deft's motion to dismiss pltff Lerman from action. Judge reserves ruling until morning. |
| | 25 | 7th day of trial—Final arguments, charge to the jury; verdict returned for the pltffs. 1 |
| | 25 | VERDICT SHEET FILED—Total compensatory damage—$72,910.00; Total punitive damages—$200,000.00. 1 |
| | 26 | Judgment entered. 1 |
| | 30 | Defts' Motion for a new trial. h |
| | 31 | Order re: Defts are exempted from compliance with local Rule 12(a)(11) requiring filing of memo with motion for a new trial. Defts and pltff shall file memos in accordance with a stip. to be filed not later than Feb. 5, 1979. |

1979 PROCEEDINGS

Feb. 5 Objection of Pltffs to motion for new trial. h
5 Pltffs' Motion for extension of time for filing their bill of costs. h
5 Defts' Motion for judgment NOV or in the alternative for a new trial. h
5 Enter the appearance of Guy J. Wells. h
14 Objection to Motion for nov or in the alternative for a new trial. h
15 Stipulation re: Pltffs and Defts hereby stipulate that dfts' memo of law in support of its mots for new trial and judgment N.O.V. will be submitted on or before Mar. 1, 1979 and pltffs' reply Mar. 15, 1979 entered. h
21 Pltffs' Motion for extension of time for filing bill of costs until decision rendered on any appeal which may result is granted. h

ar. 1 Stipulation re: Defts have to March 9 in which to file its memo in support of motion for new trial and judgment n.o.v. pltffs have 2 weeks thereafter to file their memo in opposition. 1

Mar. 23 Pltffs' motion for ext. of time is grantdd; pltffs will have up to and inluding April 4 to file their memo in opposition to defts' motions for judgment n.o.v. and new trial. 1

July 2 Opinion and Order re: A remittitur or a new trial on damages must ordered; Considering the punitive sums awarded against the other individuals in this case, $75,000. appears the maximum permissible punitive award for the city; the pltff is free to accept or reject this remittitur sum; if the remittitur is rejected, the motion for new trial on damages will be granted; the pltffs will advise the Court of its decision. 1

| 1979 | | PROCEEDINGS |
|---|---|---|
| July | 9 | Remittitur re Pltffs' accept the remittitur ordered by the court on page 14 of Opinion and Order of July 2, 1979 reducing that portion of punitive damages from $200,000. to $75,000.00. 1 |
| | 17 | Appearance of Joseph Macioci for Defts filed. |
| | 18 | Judgment entered in accordance with the verdict sheet as modified by the remi filed by pltff on July 9, 1979 entered. h |
| | 18 | Notice of appeal to the United States Court of Appeals for the First Circuit. |
| | 18 | Bond for appeal. |
| | 18 | Motion for relief from the provisions of local rule 37.h |
| Aug. | 1 | Pltff's notice of cross-appeal from Opinion and order entered July 2, 1979. 1 |
| | 2 | Pltff's bond for costs on appeal.h ($5.00 filing fee paid Receipt 2133) |
| | 2 | |
| | 2 | |
| | 7 | Remainder of Appellate Filing Fee of $50.00 pd, Receipt #2171/ca |
| | 7 | Certified copy of docket sheet sent to Court of Appeals./cah |
| Aug. | 8 | Defts' Motion for relief from the Provisions of Local Rule 37 is passed by a of counsel entered. h |
| Aug. | 10 | Clerk's certificate. |
| | 10 | Case forwarded to First Circuit Court. h |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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[Title Omitted in Printing]

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## COMPLAINT

### JURISDICTION

1. This action arises under the Due Process clause of the United States Constitution, and under 42 USC, 1981, 1983 and 1985. Jurisdiction is properly vested in this Court pursuant to the provisions of 28 USC, 1331 and 1343(3).

2. Jurisdiction over Counts II and III, is properly vested in this Court pursuant to the doctrine of Pendant Jurisdiction.

3. The amount in controversy exceeds Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

### PARTIES

4. Fact Concerts, Inc. is a Corporation organized under the laws of the State of Rhode Island for the purpose of promoting musical concerts.

Marvin Lerman is a citizen of the State of Rhode Island and at all times mentioned herein provided the financing for, and was the principal investor in a concert called "Jazz at Newport," held on August 30 and 31 of 1975, at Fort Adams, located in the City of Newport, State of Rhode Island.

5. Defendant, Humphrey J. Donnelly III is a citizen of the State of Rhode Island, and Mayor of Newport. The City of Newport is a municipal corporation located in the State of Rhode Island. Lawrence Newsome, John H. West, Robert O. Beattie, Raymond H. Carr, Edward K. Coristine and James F. Ring are citizens of the State of Rhode Island and at all times mentioned herein held positions as members of the City Council for the City of Newport. At all times mentioned herein, Defendants were engaged in a proprietary function of a governmental activity.

COUNT I

6. On or about August 22, 1975, Plaintiffs, Fact Concerts, Inc., Marvin Lerman and Defendants entered into a contract for the promotion and production of a musical concert on August 30 and 31, 1975, to be held at a facility known as "Fort Adams," property owned and operated by the State of Rhode Island. (A copy of said contract is attached hereto and is marked Exhibit "A").

7. Pursuant to, and in reasonable reliance upon their rights as in the aforementioned contract, Plaintiffs, Fact Concerts, Inc., and Marvin Lerman expended all necessary time, labor and energy and incurred great expenses in the negotiation and scheduling of performances and activities subsequent thereto to insure the success of the program.

8. On or about August 26, 1975, without any apparent provocation, the Defendants informed Plaintiffs of their intent to cancel said contract if a group known as "Blood, Sweat and Tears" remained on the program.

9. Plaintiffs acceded to the Defendants' demand, cancelled the appearance of "Blood, Sweat and Tears" and hired a substitute group known as "The Weather Report."

10. On or about August 29, 1975, Plaintiffs were advised by Defendants through their City Solicitor that the Defendants had changed their position and would allow "Blood, Sweat and Tears" on said program if the program would be limited to the playing of "jazz".

11. Plaintiffs thereupon proceeded to re-hire "Blood, Sweat and Tears" and cancel "The Weather Report" in reliance upon Defendants' representations.

12. Defendants then advised Plaintiffs that the Defendants again desired to reconsider their earlier decision, and thereafter informed Plaintiffs that the contract would be cancelled if "Blood, Sweat and Tears" remained on the program.

13. On or about August 29, 1975, Defendants advised Plain-

tiffs that they must sign a new contract wherein "Blood, Sweat and Tears" would not appear on said program which, because of their compliance with all material terms and conditions of said contract, Plaintiffs refused to do.

14. Plaintiffs, in reliance upon said contract, had sold thousands of tickets to patrons, had employed the services of performers, had arranged for all necessary and incidental services.

15. Defendants thereupon wrongfully and without authority proceeded to announce the cancellation of the concert called "Jazz at Newport" through the public media, including radio and television stations, newspaper media and the AP and UPI wire services.

16. Defendants have consistently maintained that their reluctance to allow "Blood, Sweat and Tears" to perform in said jazz program was premised exclusively upon the alleged facts that:

a) "Blood, Sweat and Tears" is a rock group so-called.

b) "Blood, Sweat and Tears" is, in fact, a group of young people with long hair, non-traditional values and otherwise allegedly undesirable attributes.

17. The conduct of the Defendants have amounted to an arbitrary, capricious and unlawful violation of the Fourteenth Amendment, due process rights. Thus, Defendants have unconstitutionally interferred with the contractual obligations existing or in force between Plaintiffs and the various jazz performing groups involved in said program.

Additionally, Defendants revoked Plaintiffs' license to hold said concert, which license had been granted pursuant to the aforementioned contract, without a prior hearing.

18. The Plaintiff's license was issued by Defendants pursuant to the provisions of Newport Ordinance No. 15-69 Sections 19-8 through 19-10 of the Newport City Code. Said Ordinance provides in pertinent part, as follows:

*Section 19-8*—"All persons, firms and corporations who

desire an entertainment license or dance license on an annual basis shall obtain the same by application to the City Council, which application would state the type of entertainment to be provided. The license fee for an annual entertainment or dance license shall be seventy-five dollars per year, payable in full when the license is issued. (Ord. No. 15-69, Sec. 1)".

19. Said Ordinance on its face is unduly vague, broad and without defined standards. Pursuant to the provisions of said Ordinance, the Defendants arbitrarily, capriciously and without any constitutional justification revoked Plaintiffs' license herein involved.

20. The Defendants, and each of them, engaged in a conspiracy to Deprive Plaintiffs of their constitutional rights as secured by the Due Process Clause of the Fourteenth Amendment by engaging in the aforementioned unconstitutional activities.

WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of TWO HUNDRED FIFTY THOUSAND ($250,000.00) DOLLARS compensatory damages, and ONE MILLION ($1,000,000.00) DOLLARS punitive damages, plus interest, costs and attorney's fees.

MOREOVER, Plaintiffs seek a declaratory judgment that Newport Ordinance Sections 19-8 is, because of its vagueness and overbreadth, unconstitutional.

Plaintiffs further seek a preliminary and permanent injunction prohibiting the City Council for the City of Newport from denying licenses for similar performances in the future.

COUNT II

1. Paragraphs 6 through 17 of Count I are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. On or about August 29, 1975, Defendants wrongfully, intentionally, and maliciously interferred with Plaintiffs' right to earn potential profits through the promotion of the concert,

"Jazz at Newport," by making announcements through the public 'medias including radio, and television stations, newspapers, and news reporting wire services, that the concert was cancelled and that Plaintiffs' license had been revoked.

3. Said announcements were in fact false, and were made by Defendants without justification or authority, and for the sole purpose of maliciously injuring Plaintiffs in the promotion of the concert.

4. By reason of Defendants' interference with Plaintiffs' production of "Jazz at Newport", Plaintiffs' reputations with the theatrical community has been damaged, thus making it difficult to retain performers in the future, and their business reputation with the concert-going public has been defamed.

5. At all times mentioned herein, Plaintiffs duly performed all the conditions of said contract on their part, expended all necessary time, labor and energy and incurred great expenses toward the successful promotion of said concert.

6. As a direct result of Defendants' interference with the promotion of said concert, Plaintiffs have sustained great financial losses, lost revenues and profits from reduced ticket sales, and incidental revenue producing activities.

WHEREFORE, Plaintiffs, Fact Concerts, Inc., and Marvin Lerman, demand judgment against Defendants in the amount of damages, and ONE MILLION ($1,000,000.) DOLLARS in punitive damages, plus interest, costs and attorneys' fees.

COUNT III

1. Paragraphs 6 through 17 of Count I, and Paragraphs 2 through 5, of Count II are hereby incorporated by reference having the same force and effect as if set forth in full.

2. Defendants' activities toward Plaintiffs, as herein set forth by reference, constitute direct acts of harrassment aimed at interfering with and permanently damaging Plaintiffs in their endeavor to produce a successful concert production.

3. Defendants have further interferred with Plaintiffs'

obligation of contract toward the performing groups hired and have the effect of permanently damaging Plaintiffs' reputations in the theatrical community and in their ability to conduct successful future concerts.

4. As a direct result of Defendants' acts, Plaintiffs have sustained damage to their reputation in the theatrical community with the performing groups involved, and most significantly, with the concert-going public.

WHEREFORE, Plaintiffs, Fact Concerts, Inc., and Marvin Lerman, demand judgment against Defendants in the amount of TWO HUNDRED FIFTY THOUSAND ($250,000.00) DOLLARS compensatory damages, and ONE MILLION ($1,000,000.00) DOLLARS punitive damages plus interest, costs and attorney's fees.

By their Attorney:

s/ LEONARD DECOF
LEONARD DECOF, LTD.
111 Wayland Avenue
Providence, Rhode Island

Dated: February , 1976

Plaintiffs hereby claim
trial by jury.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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[Title Omitted in Printing]

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ANSWER

Now come the defendant in the above entitled action and file herewith their Answer as follows:

1. The defendants deny the allegations contained in Paragraphs 1 and 2 of the Complaint in that the statutes cited are inapplicable in the instant action.

2. The defendants are without sufficient knowledge to form a belief as to the matter alleged in Paragraph 3 of said Complaint and leave the plaintiffs to the proof thereof.

3. As to Paragraph 4 of said Complaint, the defendants admit that at the time of filing of said Complaint, Fact Concerts, Inc., was a corporation organized under the laws of the State of Rhode Island as alleged.

As to the plaintiff, Lerman, the defendants are without sufficient knowledge to form a belief as to the matters stated with respect to him, and leave the plaintiffs to the proof thereof.

4. The defendants admit the allegations of Paragraph 5 of said Complaint.

COUNT I

5. The defendants deny the allegations set forth in Paragraph 6 of said Complaint in that the plaintiff, Marvin Lerman, was not a party to the alleged contract and was, and is, unknown to the defendants; further, that said alleged contract was an ultra vires action of the defendants and the plaintiffs in that it purported to regulate the use of facilities at Fort Adams, located within the City of Newport, which is, and was, property of the State of Rhode Island over which the plantiffs had no jurisdiction or propriatorial interests.

6. The defendants deny the allegations set forth in Paragraphs 7, 8, 9, 10, 11, 12, and 13 of said Complaint.

7. The defendants are without sufficient knowledge to form a belief as to the matter alleged in Paragraph 14 of said Complaint and leave the plaintiffs to the proof thereof.

8. The defendants deny the allegations set forth in Paragraphs 15, 16, 17, 18, 19 and 20 of said Complaint.

COUNT II

1. The defendants reaffirm their answers to Paragraphs 1 through 17 of Count I of the Complaint herein, which answers

are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. The defendants deny the allegations set forth in Paragraphs 2, 3, 4, 5 and 6 of Count II of said Complaint.

COUNT III

1. The defendants reaffirm their answers to Count II of the Complaint herein, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. The defendants deny the allegations of Paragraphs 2, 3 and 4 of said Count III.

SECOND DEFENSE

The Complaint, in all Counts, fails to state a claim against the defendants upon which relief can be granted.

WHEREFORE, the defendants demand judgment against the said plaintiffs, jointly and severally, together with fees and costs incurred in the defense hereof and such other relief as this Honorable Court may deem just and proper.

By their Attorneys,

s/ JAMES S. O'BRIEN
JAMES S. O'BRIEN
*City Solicitor*
City Hall
Newport, Rhode Island 02840
Telephone: (401) 846-1297

s/ FREDERICK W. FAERBER, JR., Esq.
FREDERICK W. FAERBER, JR.
*Assistant City Solititor*
City Hall
Newport, Rhode Island 02840
Telephone: (401) 846-1297

Dated: May 1, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

## MOTION TO DISMISS

The Defendants, City of Newport, Humphrey J. Donnelly III and Robert O. Beattie, said Humphrey J. Donnelly III in his capacity as Mayor of said City and a member of the Council of said City, and said Robert O. Beattie in his capacity as a member of said Council, pursuant to Rule 12 (b), Federal Rules of Civil Procedure, come now and move this Honorable Court as follows:

1. To dismiss the instant action because the Complaint fails to state a claim or claims upon which relief can be granted.

2. To dismiss said action on the grounds (a) that the Complaint fails to allege diversity of citizenship among the parties and, in fact, affirmatively identifies all parties named as persons having presence and/or citizenship in the State of Rhode Island; (b) the Plaintiff, Lerman, is a party unknown to the Defendants and is not a party to the Contract annexed to the Complaint as Exhibit "A"; indeed, he is identified solely as an "investor" in Plaintiff Fact Concerts, Inc., and as such is without standing to maintain this action; (c) the doctrine of pendent jurisdiction is inapplicable, the Plaintiff Fact Concerts, Inc., having previously initiated an action in the Superior Court of the State of Rhode Island, within and for the County of Newport, entitled Fact Concerts, Inc. v. City of Newport, et als," Docket Number C.A. 75-181, predicated essentially upon the same facts alleged herein and seeking relief essentially identical to that sought herein, which said action is still pending and in which said action partial relief has already been obtained, all as evidenced by Exhibit "A" attached hereto, and t Plaintiffs have wholly failed to meet

the requirements of General Laws of Rhode Island, 1956 (1979 Reenactment), as amended, Section 45-15-5, as evidenced by the affidavit of Robert A. Shea, City Clerk of the Defendant City as, evidenced by Exhibit "B" attached hereto.

3. To dismiss the action for insufficient service of process on the grounds that (1) although the City Solicitor of the Defendant City is authorized to act as agent for service of process said City and its elected officials, to wit, Defendants Donnelly and Beattie, in their official capacities, said Defendants are also sued herein individually, and neither has been personally served with process herein; likewise, the remaining named Defendants, Newsome, West, Carr, Coristine and are sued individually and have not been personally served with process herein, and purported service upon them through said City Solicitor is without effect.

Respectfully,

s/ JAMES S. O'BRIEN
*City Solicitor*
s/ FREDERICK W. FAERBER, JR.
*Assistant City Solicitor*
*Attorneys for Defendants, City of Newport, Humphrey J. Donnelly III, in his capacity as Mayor of said City, and said Humphrey J. Donnelly III and Robert O. Beattie, in their capacities as members of the Council of said City.*
*City Hall*—Broadway
Newport, Rhode Island 02840
Telephone 846-1297

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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## OBJECTION TO MOTION TO DISMISS

The Plaintiffs, Facts Concerts, Inc. and Marvin Lerman object to Defendants' Motion to Dismiss their Complaint filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

1. Plaintiffs' Complaint, Count I, is properly brought under Sections 42 USC, 1983 and 1985, and under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Plaintiffs are seeking equitable relief in the form of an injunction against the enforceability of an unconstitutional City Ordinance.

2. Jurisdiction over Counts II and III, wherein Plaintiffs seek monetary damages for the wrongful interference with Plaintiffs' right to earn potential profits, and the tortuous interference with Plaintiffs' obligation of contract is vested in this Honorable Court by reason of the Doctrine of pendant jurisdiction.

3. Plaintiffs' right to prosecute this action without compliance with Sec. 45-15-5 of the Rhode Island General Laws is premised upon Defendants' prior denial of Plantiffs' claim and for the reason that Plaintiffs are seeking in part, equitable relief for which compliance with said statute is not required.

4. Plaintiffs' prior filing of a Complaint in the Newport Superior Court for a restraining order against the interference by the City of the scheduled concert is not a compelling reason for this Court's abstaining from taking jurisdiction of this matter. Plaintiffs need not exhaust a state remedy as a condition precedent to filing this action for the denial of a constitutionally protected right.

For the reasons discussed in the accompanying Memorandum of Points and Authorities, Defendants' Motion to Dismiss

under Rule 12(b) of the Federal Rules of Civil Procedure should be denied.

Respectfully submitted,
s/ PHILIP M. WEINSTEIN
PHILIP M. WEINSTEIN
*Attorney for Plaintiffs*
LEONARD DECOF, LTD.
111 Wayland Avenue
Providence, Rhode Island 02906

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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ORDER

Regrettably the Motion to Dismiss has been pending an inordinate amount of time due to the unfortunate delay in appointing a judge to fill a vacancy that existed. The Court does not wish counsel to conclude the matter is now being treated summarily. In order to expedite a ruling and not have further delays attendant the preparation of an opinion, it suffices to say, full study has been given to the memoranda filed. I conclude the motion to dismiss must be denied.

So Ordered.

By Order,

s/ MICHELE L HASTINGS
*Deputy Clerk*

Enter:

s/ Raymond J. Pettine
*Chief Judge*

April 24, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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# AMENDED COMPLAINT

## JURISDICTION

1. This action arises under the First and Fourteenth Amendments of the United States Constitution and under 42 U.S.C. §1983. Jurisdiction is properly vested in this Court by virtue of 28 U.S.C. §§1331 and 1343(3).

2. Jurisdiction over Counts III, IV and V is properly vested in this Court by virtue of the doctrine of pendant jurisdiction.

3. The amount in controversy exceeds the sum of Ten Thousand and 00/100 Dollars ($10,000.00), exclusive of interest and costs.

## PARTIES

1. Plaintiff Fact Concerts, Inc. was at all times mentioned herein a corporation organized under the laws of the State of Rhode Island for the purpose of promoting musical concerts.

2. Plaintiff Marvin Lerman is a resident of the State of Rhode Island and at all times mentioned herein was engaged in a joint venture with Plaintiff Fact Concerts, Inc. to promote a musical concert at Fort Adams in the City of Newport on August 30 and 31, 1975.

3. Defendant City of Newport is a municipal corporation located in the State of Rhode Island.

4. Defendant Humphrey J. Donnelly is and was at all times mentioned herein the Mayor of the City of Newport.

5. Defendants Lawrence Newsome, John H. West, Robert O. Beattie, Raymond H. Carr, Edward K. Coristine and James F. Ring are citizens of the State of Rhode Island and at

all times mentioned herein were members of the City Council for the City of Newport.

COUNT I

1. On or about August 22, 1975, Plaintiffs sought and were granted a license by Defendant City of Newport, acting by and through its agent, Defendant Donnelly, to hold a concert on August 30 and 31, 1975, at Fort Adams in the City of Newport.

2. This license was granted pursuant to the provisions of §19-7 of the Newport City Code. Said Ordinance provided as follows:

> SECTION 19-7. All persons, firms and corporations desiring to hold a public entertainment event or a dance shall first obtain an entertainment or a dance license from the city council. Whenever an annual or daily dance license shall be issued by the city council, it shall be the duty of the chief of police to assign a police officer to such dance, unless the chief of police shall determine, based upon past experience, that the public safety does not require a police officer to be assigned. Upon receipt of an application for a dance license, the city clerk shall notify the chief of police, who shall investigate each application and notify the city clerk of those applications which do not require the assignment of a police officer.

3. Said Ordinance was amended on August 10, 1977 by Ordinance No. 24-77 and now provides as follows:

> SECTION 19-7. All persons, firms and corporations desiring to hold a public entertainment event or a dance shall first obtain an entertainment or dance license from the city council. Whenever an annual or daily dance license shall be issued by the city council, it shall be the duty of the chief of police to assign a police officer to such dance, unless the chief of police shall determine, based upon past experience, that the public safety does not re-

quire a police officer to be assigned. Upon receipt of an application for a dance license, the city clerk shall notify the chief of police, who shall investigate each application and notify the city clerk of those applications which do not require the assignment of a police officer.

In the event that such license or licenses are granted to a person, firm or corporation which is the licensed holder of an alcoholic beverage license, any license or licenses granted hereunder shall not permit such entertainment event or dance to extend for a period exceeding one half hour beyond the authorized closing time for the person, firm or corporation holding such alcoholic beverage license.

In all other instances where the entertainment events or dance licenses shall be issued the hours during which such events or dances may be held shall be as determined by said city council having due regard for public convenience, welfare, health and safety.

4. Said Ordinance is unconstitutionally vague and overbroad in that it provides no objective standards which govern the decision to grant or deny a license, nor has the city council promulgated guidelines outlining such standards.

5. Pursuant to the provisions of said Ordinance, the Defendants arbitrarily and capriciously revoked Plaintiffs' license to hold the concert scheduled for August 30 and 31, 1975.

6. Plaintiffs were forced to obtain a temporary restraining order in order to conduct their concert.

7. Plaintiff Fact Concerts, Inc. and/or Plaintiff Marvin Lerman desire to continue to promote concerts and public entertainment events in the City of Newport and said ordinance will be enforced with respect to such concerts and events.

WHEREFORE, Plaintiffs seek a declaratory judgment that Newport Ordinance §19-7 is unconstitutional. Plaintiffs fur-

ther seek a preliminary and permanent injunction prohibiting Defendant City of Newport and its agents and servants from attempting to enforce said ordinance and attorney's fees as provided in 42 U.S.C. §1988.

COUNT II

1. Paragraphs 1 through 4 of Count I are incorporated by reference as if set forth at length herein.

2. Pursuant to the provisions of said Ordinance, the Defendant revoked Plaintiff's license to hold the concert scheduled or August 30 and 31, 1975, on the sole ground that a musical band known as "Blood, Sweat and Tears," would be a part of the program.

3. The Defendants have consistently maintained that their only reason for revoking the license granted to Plaintiffs was that the group called "Blood, Sweat and Tears" would play rock music.

4. Pursuant to Defendant's revocation of Plaintiffs' license, on August 29, 1975, Defendant Donnelly announced the cancellation of the concert scheduled for August 30 and 31, 1975 through the news media, including radio and television stations, newspapers and the AP and UPI wire services.

5. Said widely-publicized announcement discouraged substantial numbers of potential customers from attending the concert on August 30 and 31, 1975; although a court order permitting the concert was ultimately obtained, it was too late to repair the damage caused by aforesaid announcements.

6. Said revocation and announcement were intended to censor Plaintiff's concert solely on the basis of its content, in violation of plaintiffs' rights to freedom of expression and due process as secured to them by the First and Fourteenth Amendments to the Constitution of the United States, and constituted an unconstitutional application of said Ordinance.

7. As a direct result of Defendants' violation of Plaintiff's First and Fourteenth Amendment rights as aforesaid, Plaintiffs sustained severe financial losses, lost revenues and profits

from ticket sales, parking, refreshment and program book sales and other incidental revenue producing activities. In addition, Plaintiffs' reputations were damaged in the theatrical and musical community and among the concert-going public.

WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of Two Hundred and Fifty Thousand and 00/100 Dollars ($250,000.00) in compensatory damages and One Million and 00/100 Dollars ($1,000,000.00) in punitive damages, plus interest and costs and attorney's fees as provided in 42 U.S.C. §1988.

COUNT III

1. Paragraphs 1 and 2 of Count I are hereby incorporated by reference as if set forth at length herein.

2. On August 22, 1975, Plaintiffs and Defendants entered into a contract regulating the manner in which Plaintiffs were to utilize said license and fixing the obligations of both parties for provision of services necessary for the concert to be held on August 30 and 31, 1975. (Said contract is annexed hereto as Exhibit A.)

3. Defendants breached said contract by revoking Plaintiffs' license for a reason other than that set forth in Paragraph 2 of the contract, which provides as follows:

> It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interests of public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation.

4. Defendants breached said contract by failing to provide the services provided for in their contract with Plaintiffs and by interfering with the conduct of the concert in other ways.

5. In preparation for said concerts, Plaintiffs were at all times in full compliance with all material terms and conditions of said contract.

6. As a direct result of Defendants' breach of contract as aforesaid, Plaintiffs sustained severe financial losses, lost revenues and profits from ticket sales, parking, refreshment and program book sales and other incidental revenue producing activities. In addition, Plaintiffs' reputations were damaged in the theatrical and musical community and among the concert-going public.

WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of Two Hundred and Fifty Thousand and 00/100 Dollars ($250,000.00) in compensatory damages and One Million and 00/100 ($1,000,000.00) in punitive damages, plus interest and costs and attorney's fees as provided in Pararaph 10 of their contract with Defendants.

COUNT IV

1. Paragraphs 1 and 2 of Count III are incorporated by reference as if set forth at length herein.

2. In reliance upon said license and contract, Plaintiffs entered into contracts with performers, sold tickets and arranged for all services necessary and incident to the concert.

3. Defendants' actions in revoking Plaintiffs' license, in announcing the cancellation of the concert, in failing to provide the services contracted for and in interfering with the conduct of the concert wrongfully interfered with Plaintiffs' contractual relations with performers, contractors, employees and ticket holders.

4. As a direct result of Defendants' interference with Plaintiff's contractual relations, Plaintiffs sustained severe financial losses, lost revenues and profits from ticket sales, parking, refreshment and program book sales and other incidental revenue producing activities. In addition Plaintiffs' reputations were damaged in the theatrical and musical community and among the concert-going public.

5. Defendants' actions as aforesaid were taken with malice and wanton disregard for Plaintiffs' rights.

WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of Two Hundred and Fifty Thousand and 00/100 Dollars ($250,000.00) in compensatory damages and One Million and 00/100 Dollars ($1,000,000.00) in punitive damages, plus interest and costs.

COUNT V

1. Paragraphs 1 and 2 of Count IV are hereby incorporated as if set forth at length herein.

2. Defendants' actions in revoking Plaintiffs' license, in announcing the cancellation of the concert, in failing to provide the services contracted for and in interfering with the conduct of the concert wrongfully interfered with Plaintiffs' advantageous relations with potential purchasers of concert tickets and with performers, agents and promoters in the musical community.

3. As a direct result of Defendants' interference with Plaintiff's advantageous relations, Plaintiffs sustained severe financial losses, lost revenues and profits from ticket sales, parking, refreshment and program book sales and other incidental revenue producing activities. In addition, Plaintiffs' reputations were damaged in the theatrical and musical community and among the concert-going public.

4. Defendants' actions as aforesaid were taken with malice and wanton disregard for Plaintiffs' rights.

5. WHEREFORE, Plaintiffs demand judgment against Defendants in the amount of Two Hundred and Fifty Thousand and 00/100 Dollars ($250,000.00) in compensatory damages and One Million and 00/100 Dollars ($1,000,000.00) in punitive damages, plus interest and costs.

By their Attorneys,

s/ (Illegible)
Decof, Weinstein & Mandell
500 Howard Building
Providence, Rhode Island 02903

# CONTRACT

THIS CONTRACT, executed in duplicate, entered into this 22nd day of August, A. D. 1975, by and between the CITY OF NEWPORT, a municipal corporation in the State of Rhode Island, hereinafter referred to as the "City," and FACT CONCERT, INC., a Rhode Island corporation, hereinafter referred to as the "Producer":

WITNESSETH:

1) That the City does hereby grant to the Producer an entertainment license for the dates of August 30 and 31, 1975, for the purpose of conducting a music concert at Fort Adams in the City of Newport.

2) It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interests of public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation.

3) The Producer does hereby covenant and agree to pay to the City for the entertainment license and as a deposit to cover City expenses the sum of One Thousand ($1,000.00) Dollars by cash or certified check, upon the execution of this Contract, but no later than August 22, 1975.

The Producer also agrees to pay to the City all costs the City incurs for the providing of police and fire protection and any other City expenses incurred as the result of the Music Concert held at Fort Adams by the Producer. Said expenses shall be compiled by the Director of Public Safety and the net total of said expenses shall be paid by the Producer on or before August 22, 1975, in the full amount. Within five (5) days following August 31, 1975, the Director of Public Safety shall compile a final total of all expenses incurred by the City, and if said total is greater than the total paid by the Producer, the balance shall be paid by the Producer immediately if the final total is less than the amount paid by the Producer then the dif-

ference shall be rebated to the Producer.

In the event the concert license is cancelled for any reason, then the Director of Public Safety shall determine what rebate, if any, shall be returned to the Producer because of said cancellation.

4) It is expressly understood and agreed by the parties hereto that all expenses attributed to the music concert shall be paid directly by the Producer, other than police protection and other municipal services outside the confines of Fort Adams. Included as direct expenses of the Producer shall be all electrical charges, charges for toilet facilities, telephone charges, water charges and any and all charges arising from the operation of the music concert at Fort Adams on the date aforesaid.

5) It is agreed by the Producer that the maximum capacity of Fort Adams at the performance given by him under this Contract shall be no more than seven (7) thousand persons and the Producer agrees not to sell any tickets in excess of seven (7) thousand for the performance of this Contract.

6) The Producer further agrees that the performances given under the authority of this Contract shall terminate before sunset on August 30 and August 31, 1975.

7) The Producer agrees to comply with all orders of the Director of Public Safety with reference to fire and police protection and safety including, but not limited to, the following:

a) Auxiliary generator for lighting
b) Firefighters for fire protection and first aid duties.
c) Portable fire fighting equipment, stage area
d) Seating to be arranged so that aisles point near exits off the field as well as possible—all chairs to be wired together. Exits and entrances shall be provided as directed.
e) All seats to be installed and ready for occupancy no later than 3:00 P.M. on August 29, 1975.

8) The Producer agrees that he will not allow the sale of any alcoholic beverage other than beer at Fort Adams and that all concession stands will have signs indicating no beer will be sold to any person under 18 and the sale of beer shall be limited to two (2) glasses per person at one time. All beer and any other beverage shall be sold in paper cups only.

9) The Producer further agrees to comply with all rules, regulations and orders of the Director of Public Safety of the City concerning the public welfare within or without Fort Adams, which rules, regulations and orders shall be binding on the part of the Producer and promptly complied with.

10) In the event it becomes necessary to file legal action to enforce any provision of this Contract, the parties hereto agree that the prevailing party shall be entitled to recover as part of the costs of such action, all reasonable attorney's fees.

IN WITNESS WHEREOF, the City has caused this Contract to be signed and its corporate seal to be hereto affixed by Humphrey J. Donnelly, III, its Mayor, duly authorized by vote of the City Council, and FACT CONCERT, INC., has hereunto set its hand and seal by its President, Frank H. Amado, on the day first above-written.

In presence of:

s/ Mary C. Murphy

CITY OF NEWPORT

By: s/ Humphrey J. Donnelly, III
Mayor

FACT CONCERT, INC.

s/ (Illegible)

By: s/ Frank H. Amado
President

APPROVED:

s/ Frederick W. Faerber, Jr.
Assistant City Solicitor

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title Omitted in Printing]

## ANSWER TO AMENDED COMPLAINT

PARTIES

1. Defendants admit the allegations relating to Fact Concerts, Inc.

2. The Plaintiff Lerman is unknown to said Defendants and the Defendants are, therefore, without sufficient knowledge to form a belief as to the matters stated with respect to him and leave the Plaintiffs to the proof thereof.

3. Defendants admit the allegations of paragraph 3, 4 and 5, but deny that the Defendant Robert O. Beattie is presently a citizen of the State of Rhode Island.

COUNT I

1. Defendants deny that on or about August 22, 1975, Plaintiffs sought and were granted a license by Defendant City of Newport, acting by and through its agent, Defendant Donnelly, to hold a concert on August 30 and 31, 1975, in the City of Newport; they further deny that Plaintiff Lerman at any time sought and was granted a license by said Defendant City, or any person or persons acting in its behalf.

Defendants admit that on or about August 22, 1975, a contract relating to such license was entered into by the Defendant City of Newport and the Plaintiff, Fact Concerts, Inc., to which contract the Plaintiff Lerman was not a party. A copy of said contract is attached to Plaintiffs' Amended Complaint and made a part thereof.

2. Defendants admit that a license was granted pursuant to Section 19-7 of the Newport City Code, and that said ordinance is properly quoted.

3. Defendants admit the allegations of paragraph 3, but deny that the same has any relevance to the matters in issue before this Honorable Court.

4. Defendants deny the allegations of paragraphs 4, 5 and 6.

5. Defendants are without sufficient knowledge to form a belief as to the matters stated in paragraph 7, assert that the allegations thereof are speculative, and unrelated to the Plaintiffs' asserted claims for damages in subsequent Counts of their Amended Complaint.

FURTHER, Plaintiffs are not entitled to the injunctive relief sought since they fail to set forth any claim of impending injury, loss or irreparable damage. In addition, in Plaintiffs' prayer for injunctive relief, the Defendants are unable to fully answer the same since said prayer appears to be incomplete and therefore incoherent.

COUNT II

1. Defendants reaffirm their answers to pararaphs 1 through 4 of Count I, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. Defendants deny the allegations of paragraphs 2, 3, 4, 5, 6 and 7 of said Count II. Further, with respect to said paragraph 7, Defendants particularly deny that damage to Plaintiffs' alleged reputations is a proper subject of relief under any of the Civil Rights Acts, so-called, or the First and Fourteenth Amendments to the Constitution of the United States.

COUNT III

1. Defendants reaffirm their answers to paragraphs 1 and 2 of Count I, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. Defendants admit the allegations of paragraph 2 of said Count III to the extent that they relate to Plaintiff Fact Concerts, Inc.; they deny said allegations insofar as they relate to Plaintiff Lerman.

3. Defendants deny the allegations of paragraphs 3, 4, 5 and 6 of said Count III and, in addition, reaffirm their position as to the impropriety of alleged damage to the Plaintiffs' reputations as proper subject matter of the instant action asserted in said paragraph 6.

COUNT IV

1. Defendants reaffirm their answers to paragraphs 1 through 3 of Count III, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. Defendants are without sufficient knowledge to form a belief as to any contracts alleged to have been entered into with performers, and leave Plaintiffs to the proof thereof; Defendants admit that Plaintiffs sold tickets as alleged and, otherwise, deny all further allegations of paragraph 2 of Count IV.

3. Defendants deny the allegations of paragraphs 3, 4 and 5 of said Count IV, and particularly reaffirm their position as to the impropriety of alleged damage to the Plaintiffs' reputations as proper subject matter of the instant action, which damages to reputations are asserted in paragraph 4 of said Count IV.

COUNT V

1. Defendants reaffirm their answers to paragraphs 1 and 2 of Count IV, which answers are hereby incorporated by reference, having the same force and effect as if set forth in full.

2. Defendants deny the allegations of paragraphs 2, 3 and 4, and particularly reaffirm their position as to the impropriety of alleged damage to the Plaintiffs' reputations as proper subject matter of the instant action, which damages to reputations are asserted in paragraph 3 of said Count V.

SECOND DEFENSE

The Amended Complaint fails to set forth a cause of action upon which relief may be granted.

THIRD DEFENSE

At all times referred to in each Count of said Amended Complaint, the Defendants, jointly and severally, acted in good faith, and thereby enjoy immunity herein.

WHEREFORE, Defendants demand judgment against said Plaintiffs, jointly and severally, together with fees and costs incurred in the defense hereof and such other relief as this Honorable Court may deem meet, just and proper.

By their Attorneys,

s/ JAMES S. O'BRIEN
JAMES S. O'BRIEN
*City Solicitor*

s/ FREDERICK W. FAERBER, JR.
FREDERICK W. FAERBER, JR.
*Assistant City Solicitor*
City Hall
Newport, R.I. 02840
Telephone: (401) 846-9600

December 11, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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[Title Omitted in Printing]

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## STENOGRAPHIC TRANSCRIPT OF TRIAL

* * *

[DONNELLY, *Direct*, Begins, Tr. Vol. II, p. 207]

[II208] Q. Are you the Mayor of the City of Newport? A. I am.

Q. How long have you been the Mayor? A. Since 1971.

Q. And prior to that were you on the City Council of the City of Newport? A. Yes, I've been on the City Council since 1969, Chairman 1972, Chairman and Mayor.

Q. How many people are on the City Council of Newport? A. Seven.

Q. That's including yourself? A. Including myself.

Q. So there are six besides you? A. That's right.

Q. Is that the way it has been since you were first on there, since 1969? A. Yes.

Q. Now do you get to be elected Mayor of the City of Newport? A. You first run for City Council. The City has seven Council members divided into four wards. There's one councilman for each of the four wards, then there are three who are elected by the city at large. You have to be an at-large councilman to be the mayor so you have to run, get elected to the Council at large and then you have to get four votes of the City...

* * *

[II227] Q. You don't remember? A. No.

Q. Before this meeting was called on the 26th of August had you knowledge that Blood, Sweat and Tears was supposed to be on the program? A. Again it's really difficult with the date and—

Q. Well, without fastening on the date, this was quite a group that, this was quite a controversy boiling in Newport all week about this jazz concert? A. Yes, there was.

Q. It's something that made a big impression on the papers, I'm sure that it concerned you, didn't it, politically? A. That's true.

Q. You know that there were two meetings held that week, one on Tuesday and one on Friday, all right, so I'm trying to find out if anything sticks out in your mind about this momentous series of events. Without reference to dates the first meeting, the Tuesday meeting, when you went into that Tuesday meeting did you know anything about Blood, Sweat and Tears? A. I honestly don't remember. You're trying, I want to be as honest as I can, I'm honestly trying to be, I just don't remember specifically. I know that there was much concern, I [II228] know that Blood, Sweat and tears was brought in to replace, I think it was Sarah Vaughn, and that the Council had concern as I had concern over public safety because of previous events that had happened and perhaps larger crowds being attracted by a group such as Blood, Sweat and Tears than we felt we could handle or we wanted to have in the community at that time.

Q. You're saying this now in retrospect, Mayor, is that correct? I'm asking you how this meeting got called, who expressed concern, what you knew about the Blood, Sweat and Tears problem before you went into this meeting, can you tell me anything about that? A. Not specifically.

Q. Generally? A. Generally I stated it.

Q. Did you know about these problems before you went in to the meeting, the problem you talked about with Blood, Sweat and Tears, the traffic problem? A. Yes, I knew and we were concerned at the time that something, that only a jazz festival would be proper and that the performers would be jazz performers because the trouble that was had in the past in 1971 and the jazz festival, when performers got up and did not

perform jazz, they performed other than jazz and it incited the crowd and the riots followed.

* * *

[II235] Q. And no evidenciary hearing took place? A. No, sir, that's correct.

Q. Now can you recall for me, sir, whether you had any meeting between Tuesday, the 26th of August, and Friday, the 29th of August, concerning the jazz festival? A. I don't recall meeting specifically but I'm sure there was conversations.

Q. Well, getting down to, you say you had a conversation, was that with other Council members of the City Council? A. Yes.

Q. Can you tell me any, give me any date or approximate date? A. No, sir.

Q. Or approximate times? A. No, sir.

Q. Can you tell me the names of the persons who have been together with you at these conversations? A. No, I don't remember whether we were together as a group or just one or two or whatever, I don't remember. I do remember our City Solicitor telling us we would be subject to suit or we were threatened with a suit and being concerned about that.

Q. Do you remember the City Solicitor telling you that you didn't have the right to approve or disapprove of who played on the [II236] program? A. I don't remember it specifically but I would say that he did because I was under the impression that we had the right to say who would be on the program.

Q. And he told you that you didn't have that right, the contract was signed and did not provide for that? A. That's right.

Q. So you can't recall for me any meeting or conversations that took place during that week? A. That's right.

Q. Can you recall any meeting with Mr. Amado or Mr. Lerman or any of Fact Concerts? A. I don't recall.

Q. You don't recall anything that happened? A. No,

again it's difficult for me to say that I talked with him on a certain day and a certain hour and whatever he said.

Q. I'm not asking you that, Mayor, I want to know if you had any meetings? A. At which time?

Q. During this week when all of this excitement was going on. A. I don't recall. I think Mr. O'Brien was in contact with him.

Q. So you don't remember? A. Right.

* * *

[II331] MR. FAERBER: Thank you, sir, no further questions.

(Witness excused.)

THE COURT: Can you tell me how many more witnesses you have?

MR. DECOF: May we go to the side bar, Your Honor.

(Colloquy at side bar between Court and counsel)

MR. DECOF: Judge, before we get into the next witness I want to make known my intention to the Court with reference to the area I intend to go into so the Court has some advance notice of this. One of the areas I want to get into with this witness is that while he was a member of the City Council the City Council had been restrained by order of this Court in a previous case from impinging upon the right of free speech. the basis of my going into it is to show prior knowledge and deliberate indifference; prior knowledge, indifference, prior knowledge concerning the right of free speech.

THE COURT: Well, you're thinking of that aspect of the civil rights law wherein the constitutional principle is so well established that it may eliminate a possible good faith defense.

MR. DECOF: Right, the right of free speech is so well established that you don't have to know that he was previously restrained.

MR. FAERBER: I think Mr. Decof is referring to the [II332] Tiger Cage, the American Society of Friends and Volunteers, something like that.

THE COURT: I remember that case.

MR. DECOF: It was a question of a display on Washington Square. This goes again even to this, even if they took the position that, well, you know, we didn't know it, this right of free speech involved here, there is no civil rights law, this is an element that could go to it.

THE COURT: I'm not too sure they are entitled to a good faith defense on the record as it now stands, I haven't decided as yet.

MR. DECOF: This is an intentional act.

THE COURT: You see, what bothers me here, the same thing that bothered me with reference to when Mr. Faerber was questioning about what happened in 1971 at a rock concert, that is, undue prejudice in a type of thing like this. I think he could be questioned, does he know of the right of free speech, has he known about it, you know that type of an examination, then if he should say no, he doesn't know, he wasn't aware, then of course now the picture changes as to the right to impeach him. I'm afraid I couldn't allow it at this point, I think it would be, I know I can't allow it, I think it would create the impression with this jury that the City Council just arbitrarily knocks off all these things and are willing...

* * *

[WEST, *Direct* Begins Tr. Vol. II p. 476]

VOLUME III

[III30] MR. DECOF: Objection.

THE COURT: Sustained.

Q. What was that disturbance? A. As I stated just a moment ago, people—

MR. DECOF: If the Court please, excuse me, it's already asked and answered, I see no point in going over the same thing twice, three times, four and five.

THE COURT: That's fair enough comment. I will allow this one more time.

A. Mr. Faerber, as I stated, there were minor disturbances that were caused by the numbers of people outside who couldn't get inside, couldn't purchase a ticket and just wanted admission, so they decided to make admission for themselves. Same problem in 1971, I mean, just of greater magnitude. It was a very minor magnitude in 1969 as compared to '71, obviously.

Q. Were you associated with the '71 festival? A. Oh, yes.

Q. And was this also at Festival Field? A. Yes, it was.

Q. What happened at that time? A. As I stated in previous testimony 35,000 came to the event, [III31] which could handle 12,000, and I don't have to say much more, it's all a matter of public record. It was a disaster, it was a full-scale riot with bodily injury to hundreds and hundreds and subsequently canceled by the council, the Police Department and canceled forever.

MR. DECOF: I move to strike the latter part of that, your Honor.

THE COURT: Yes, the latter part is stricken.

Q. So there were, you have expressed minor disturbances in 1969 and a greater disturbance in 1971? A. I was there in 1960, too.

Q. What about 1960? A. Well, that was the first full-scale riot.

MR.DECOF: Objection, if the Court please. We're talking of '75, this is fifteen years ago.

THE COURT: I think you've gone as far as you can go.

Q. Now, having in mind the events of 1969 and 1971, were those factors which you considered at the August 26 meeting in 1975?

MR. DECOF: Objection, if the Court please.

THE COURT: Overruled.

A. Yes, they prejudiced my mind greatly.

Q. In what sense did they prejudice your mind? A. The safety of the people of the community of Newport.

• • •

[WEST, *Cross* Begins Tr. Vol. III p. 37]

* * *

[III40] XQ. And the city refused to allow that to happen? A. We refused to grant them a license, sir.

XQ. And they went to the Federal Court, to this very Federal Court, is that right? A. Yes, they did.

XQ. And before this very Chief Judge, Judge Pettine, isn't that right, sir? A. Yes.

XQ. And he issued a restraining order, an injunction restraining the City of Newport and you, as a member of the City Council from interfering with the right of these people to exercise free speech in the form of demonstration, isn't that right, sir? A. Slightly incorrect, he refused the rights of us not to grant them a license, which is a little bit different as far as I was concerned. They had applied for a license, we refused it, and Judge Pettine refused to allow us to refuse a license.

XQ. More precisely what happened is, in other words, he enjoined you people from refusing a license? A. Well, that's his opinion, sir, you can't hold me accountable for the Judge's opinions.

XQ. As a matter of fact, you don't have much respect for the Judge's opinion, do you, sir? A. About as much as you have.

* * *

[CRISTINE, *Cross* Begins Tr. Vol. III p. 98]

[III100] XQ. Notwithstanding the two problems you talked about with the chairs and the generator, isn't that correct, sir? A. I believe that is correct.

XQ. There was nothing in the new affidavit, new contract, which was going to say you had better wire up the chairs instead of taping, nothing was talked about that? A. No, except you must realize that the chairs really did not become an issue until the last minute, so we couldn't have really made that a prerequisite.

XQ. I'm going to ask about the chairs. They didn't become an issue until the last minute, did they, sir? A. That's correct.

XQ. And by the way, did you ever go out to inspect the premises at Fort Adams before the festival? A. I did not.

XQ. You did not—did you attend the festival, by the way? A. I did not.

XQ. So anything you know about the chairs or the generator was what Mr. Perry told you? A. That's correct.

XQ. Is that right? A. Right.

XQ. By the way, sir, were you on the City Council in this case involving the tiger cage came up? A. I was.

[III101] XQ. Do you know when that was? A. I don't remember the exact date, no.

XQ. Do you remember the year? A. I believe it was the same year we are talking about.

XQ. The same year? A. I'm not positive, but I believe it was.

XQ. But it happened before the Jazz Festival? A. I believe that's correct, but, I mean, I'm not positive of that, though. I rather would really stay away from that, though, because my memory isn't that fresh.

XQ. Your best recollection, I'm not holding you to it, it was sometime in the same year? A. I think so, yes.

XQ. You told us that—by the way, before I get into that, do you recall whether or not every year the United States Navy Band would perform a band concert in Eisenhower Square, Eisenhower Park?

MR. FAERBER: I object, your Honor. I don't see the relevancy.

THE COURT: He may answer the question does he recall. Overruled.

XQ. Do you recall, sir, whether the United States Navy used to give a band concert in Eisenhower Park every year? A. I have honestly a reservation about answering that.

When you say "every year," I believe there were years when they played, whether they played every year or not, I'm not sure.

* * *

[CARR, *Direct Begins* Tr. Vol. III p. 107]

. . .[III661] at that time, and when he comes in here and all of a sudden a meeting is called on the 26th, and there's going to be a change in the original program, they were going to allow, we were bending over backwards for Mr. Amato, we weren't trying to hurt Mr. Amato, and when he comes in with a new change, and we told him we didn't want any rock, we told him that when we originally dealt with him, and he, being a Newporter, a Newport businessman, he had said he realized what the Council wanted, and he would do everything he could to go by what we wished if we grant the license, and I'm saying in good faith, we had all of these things, we didn't try to hurt Mr. Amato or anybody. We went along, and we signed the contract, we changed the dates for Mr. Amato, and we had a special meeting, as you know, where Blood, Sweat and Tears came up. There was concern, concern arose because of this late date about what we, I'm talking about for myself, I knew nothing about Blood, Sweat and Tears, I'm not a music buff or music lover, but here I am, I'm placed in the position where I think we're all trying to stress that we are sitting here trying to make decisions that are best in foreseeing the future. You don't want anything to happen. We all live in Newport. I've been there all my life, and they have these problems at the festivals. We had been through the problem the year before in '74 with Mr. Russo, who we gave a license to, that I voted against down in Cardine's Field [III112] in the City. We had all kinds of problems and here we're getting into it once again, and you're trying to see the same thing doesn't happen, you're trying to protect the citizens. I have my constituents, and I'm trying to think of the people and a concert like that, and I

mean, this last minute change and so on. I just couldn't, in my heart and in my mind, vote in favor of letting Blood, Sweat and Tears go on unless they could guarantee, and we made them an offer, whether written or verbal, if they would say that Blood, Sweat and Tears would not play rock the concert could go on. I mean, because it was, we were afraid that if rock were played and so forth and so on, that the crowd would be stirred up and then trouble would arise. That's what we have to look into, is the contract being fulfilled, I mean, because you're trying to eliminate anybody being injured and this is the whole basis for my reason that I voted against him. I mean, we went along with him, we gave him all the time, we offered if he would guarantee that they'd play no rock we would let them go on.

THE COURT: Mr. Faerber, you know, I think a conference would have made possible the giving of the testimony in a smoother fashion. I gather from all the man has said, he was concerned about the public's welfare, the citizens of Newport, I have to read into what he's saying that he was afraid that rock music was going to create problems.

* * *

[III129] MR. DECOF: No further questions, your Honor.

(Witness excused)

JAMES F. RING, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Faerber*

Q. (By Mr. Faerber) Sir, what is your full name? A. James F. Ring.

Q. Where do you reside? A. 8 Cliff Terrace, Newport, Rhode Island.

Q. How long have you resided in Newport? A. All my life, with the exception of three and a half years in the Navy during World War II and six years in San Diego from 1960 to 1966.

Q. What is your present occupation? A. I'm retired from federal service.

Q. Now, during what period did you serve on the City Council? A. From November 1, 1971 through November 1, 1975.

Q. So you were there on the Council in August of 1975? A. Yes, sir.

Q. Sir, do you recall a special meeting of August 26, 1975? A. Yes, I do.

Q. Do you recall what transpired at that meeting? A. I believe the major issue was the substitution of one act for another.

[III130] Q. Did that cause you concern? A. Not initially, sir, because the act that was substituted was Blood, Sweat and Tears, and I didn't have any background on Blood, Sweat and Tears.

Q. Do you recall who was present at that Council meeting? A. All of the Council. I recall Mr. Perry, Mr. O'Brien and the City Clerk.

Q. Now, you say not initially you were not concerned because you had no knowledge of who Blood, Sweat and Tears was. Did anything arise in that meeting of August 26th that gave you any concern? A. There was some discussion between those present councilmen and others that a rock group or outfit with the wrong background had been substituted and that was of concern to the Council. It was of concern to me because we had initially been informed there would be no rock music present.

Q. Why was it of concern to you other than the fact that you made the original statement that you referred to here? A. I'm sorry.

Q. Why was it of concern to you other than the fact that it was a new outfit? A. The fact that there might be a rock group being substituted.

Q. Yes, and why was that of concern to you? A. Because we had had previous problems in the City of Newport not only at jazz festivals per se, but previous crowds that [III131] had been there, the type of people that were attracted by rock groups.

Q. Now, referring to the meeting of August 29 were you present at that meeting? A. Yes, sir.

Q. And were you present when Mr. Perry rendered his report as to his observation of the site at Fort Adams? A. Yes, sir.

Q. What was your reaction to Mr. Perry's report? A. Well, I was concerned because the basic safety requirements of the contract, which were in that contract as a result of the expertise of the department heads, Police Chief, Fire Chief, based on previous experience that this particular type of thing should be in there as a requirement, and it was not, according to what was reported, it was not being followed, according to Mr. Perry.

Q. And for what purposes were those requirements inserted in the contract, if you know?

MR. DECOF: Objection.

THE COURT: You object, Mr. Decof?

MR. DECOF: Yes, your Honor. This is the same thing, we've had this question, and it just doesn't stop. The contract speaks for itself.

THE COURT: I made the ruling once, I made it twice, I'm making it a third time. I don't like to say this,

* * *

[NEWSOME, *Direct* Begins Tr. Vol. III p. 137]

[III139] Q. Now, did you, as an individual councilman have any concern about that substitution? A. Yes, I did.

Q. Why? A. Well, I had worked at the Jazz Festivals before when I was home in the summer from college, and I was also familiar somewhat with Blood, Sweat and Tears. In

fact, they had been a rock group, and consequently I also had many calls from constituents who had learned when it became public, expressing concern because of past circumstances, and my concern was that they would draw not only a different crowd, but a larger crowd than Sarah Vaughn, and consequently we would have problems. The problems had nothing to do with the amount at the festival. Our problems began outside the festival.

Q. When you speak of problems, what do you mean? A. Disturbances, whether it be Freebody Park, Festival Field, or elsewhere. Usually I find that the majority of people don't go to the festival, itself, they go to the festival because of the festivities outside the park.

Q. Now, do you recall, was Chief Sullivan at that meeting? A. I can't recall whether we spoke with him there, I don't remember if it was that meeting or the meeting on Friday, or somewhere in between, but we did have a report from him [III140] and other department heads.

Q. Now, moving along, were you present at the special meeting that was called on August 29th? A. Yes, sir.

Q. And do you recall the purpose for which that meeting was called? A. I think it was just a continuation of what we had been discussing in that any time we deal with anybody in the Council we try to bend over backwards to accommodate them, and I think that last meeting to my recollection was that we were hoping to come up with a solution to the problems that bothered the Council up to that point. When you say problems that bothered the Council, you mean problems between Fact Concerts and the insertion of rock?

A. There had been no rock prior to this, and, you know, it was just a matter of speculation if they had a change, or if they didn't have a change, everybody had an opinion on it, and at that point to me it wasn't what they played, I think it was the connotation of the name, you know, after recalling and listen-

ing to everything, it was the connotation of the name of the particular group, and it was my concern was not any one particular problem, I think the contract which you people discussed was the coupe de grace of the whole series of things which were mentioned before, which is the good faith, and the discussion with Mr. Amato, [III141] being a Newporter, and the insertion at the last minute of a new group and having worked at some of these festivals, I was concerned, you know, that what had happened in the past when a ringer was brought in, because of lagging sales at the last minute, the type of crowd that they would bring in. You see, I had had quite a few phone calls from constitutents which expressed the concern.

Q. Do you recall specifically what Mr. Perry reported to you?

THE COURT: What time period?

MR. FAERBER: I'm sorry. August 29, your Honor please.

MR. DECOF: Again, it's the same question that has been asked and ruled on by the Court.

MR. FAERBER: Let me withdraw the question, your Honor.

Q. Did you hear Mr. Perry's report? A. We met with him and discussed several times, like even prior to the meeting, at which you sit down and things are discussed, which there are no minutes of them, as has been brought up in testimony before, the minutes are very poor, in fact, up to that time no vote, no minutes were taken as to what councilmen voted for. It was just 5-0, 5-2, 5-5, there was no specifics as to who voted for what up to that point. That has since been rectified.

MR. DECOF: Your Honor, may I ask that the answer to "Did you hear Mr. Perry's report" be answered. He said,

* * *

[III143] A. Yes, I did.

Q. And did you vote in favor? A. Yes.

Q. When they subsequently applied for a change in dates to Labor Day weekend did you vote in favor of that? A. Yes, I did.

Q. And insofar as you, as a councilman are concerned, was the relationship between the City of Newport, you, Fact Concerts and Mr. Amato amicable through at least August 26? A. Yes, that's the main reason why I voted for it in spite of the problems that we've had in the past.

Q. Was the Council in a position of willingness to negotiate this matter further to the evening of August 29?

MR. DECOF: Objection, if the Court please.

THE COURT: Sustained.

MR. FAERBER: You may inquire.

*Cross-Examination by Mr. Decof*

XQ. (By Mr. Decof) Sir, to start off with, were you on the City Council when this tiger cage case took place? A. Yes, I was.

XQ. Do you remember when that was, sir? A. I don't remember the exact time, it had to be in '73 and '75, that's when I was on the Council.

XQ. You don't remember if it was '70, '75? A. No, I don't.

* * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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[Title Omitted in Printing]

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## JURY CHARGE

Members of the Jury, it is now the duty of the Court to instruct you in the law applicable to this case which is about to be submitted to you. As I have already told you — you will apply that law to the facts of the case as you determine those facts.

You have heard the testimony of the witnesses and in your jury room you will have with you the exhibits that have been introduced in the course of this trial. Both sides have rested so that the entire case is before you insofar as it concerns the evidence — the evidence that you must consider.

The action you have just heard is referred to as a civil case, and under our practice in a civil case the [2] plaintiff files a complaint which sets forth the kind of action instituted by the plaintiff and outlines to the defendants the claim that is being made against them.

In this case the complaint alleges in Count I that the plaintiffs were denied certain constitutional rights. They claim that the defendants deprived them of their rights under the First and Fourteenth Amendments of the Constitution by revoking their license to hold concerts on August 30 and 31, 1975 at Fort Adams. The action is brought under the Civil Rights Act.

The Civil Rights Act is referred to as 42 U.S.C. §1983. It reads:

> "Section 1983 of Title 42 of U.S.C.A. provides that any inhabitant of this Federal District may seek redress in this Court, by way of damages, against any person or persons who, under color of any law, statute, ordinance, regulation, or custom, knowingly subject such inhabitant to the

deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States."

Ladies and gentlemen, this Act which I have just read to you was enacted by Congress under the Fourteenth Amendment to the Constitution. The Fourteenth Amendment provides:

"No State shall make or enforce any law which shall abridge the privileges [3] or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Members of the Jury, I could engage in a long, detailed explanation of the Civil Rights Act but I do not think it is necessary because your purposes can be accomplished through a general statement on the pertinent law which you must apply.

It all amounts to this — we have certain rights, privileges, and immunities which are secured to us and protected by the United States Constitution. One of these liberties, found in the First Amendment, is the protection of our right to freedom of speech and expression from arbitrary actions by government; in using the term "by government" I am also referring to cities and towns. The First Amendment protecting freedom of speech includes freedom of artistic expression, whether it be in books, pictures, paintings, plays, or concerts, and this right to freedom of artistic expression is entitled to the same serious consideration that you would give to a claim that a book or newspaper had been censored. As it pertains to this case, the right under the First Amendment of artistic expression also includes the right to hire groups or performers to appear at a concert. However, this right is not absolute. Town officials have the right to deny a license, provided such denial is [4] consistent with a legitimate interest in the health and safety of the citizens of its town; but this right does not permit a city or

town to deny a license because of the contents of a proposed show. Expressed differently, it is impermissible for a government to attempt to control the contents of expression. Now, in the exercise of the broad power they do have to protect the health and safety of the citizens, they cannot act arbitrarily; that is, they must act according to definite standards that are indeed related to the health and safety of the citizens.

In addition to what I have just told you, plaintiffs must also prove that the defendants were acting under "color of law." There is no dispute about this — the defendants do not deny that they were acting under color of law. However, I will explain what this means to help you better understand the Civil Rights law. As I said, those who violate these rights must be acting "under color of law." That is, the unlawful act must consist of an abuse or misuse of power which is possessed by the official simply because he is an official and the unlawful acts must be of such a nature and be committed under such circumstances that they would not have occurred but for the fact the person committing them was an official purporting to [5] exercise his official powers. Again, as to this point you need not concern yourselves. It is not disputed. That is, the defendants agree they were acting under color of law; they were acting in their official capacity in the performance of their official duties. So, in order to prove their claim, the burden is on the plaintiffs to establish by a preponderance of the evidence the following facts:

1) That the defendants acted arbitrarily in denying a license to the plaintiffs; that is, they were not motivated by a strong and legitimate concern for the health and safety of the citizens and did not act according to any standards that are indeed related to the health and safety of the citizens.

2) That the defendants were acting under color of law.

3) That the defendants' acts in denying the license deprived the plaintiffs of their First Amendment right to artistic expression or promotion of such expression.

4) That the defendants' acts and conduct were the proximate cause of damages to the plaintiffs.

Ladies and gentlemen of the Jury, you will note that the City of Newport is a defendant in this action. Under federal law a city is liable if it directly acts, through a course of action or policy set by the governing town officials, to deprive someone of their protected constitutional rights. Likewise, under state law, a city is to be treated similarly [6] to any other person who commits a tort. Therefore, if you find the City of Newport liable, you should treat it as you would any other individual defendant.

Ladies and gentlemen of the Jury, in this kind of action the defendants are responsible for the natural consequences of their actions. However, they are entitled to what is known as a "good faith" defense if their conduct was motivated by permissible intentions; that is, that they acted sincerely and with a belief that they were doing the right thing. However, an act violating a person's clearly estabished constitutional rights cannot be justified by ignorance or disregard of settled undisputable law on their part. The defendants must be held to a standard of conduct which is based not only on permissible intentions, but also on knowledge of the basic unquestioned constitutional rights of the plaintiffs. Putting it in another way, the defendants' subjective intentions do not invoke this defense of good faith if they knew or reasonably should have known that the action they took within the sphere of the official responsibility would violate the plaintiffs' clearly established constitutional rights. The First Amendment right of artistic expression is unquestionably a clearly established constitutional right.

Ladies and gentlemen of the Jury, as to this defense there is no question that the defendants intentionally denied a license to these plaintiffs. If you find that they knew or should have known the Plaintiffs' First Amendment rights would be violated by denying this license and you [7] find they did not deny this license to protect the health and safety of the citizens

of Newport, then, if the other four elements I have already given to you are satisfied, your verdict must be for the plaintiffs against the defendants. Putting it another way — if they knew or should have known the denial of the license implicated the plaintiffs' First Amendment rights but they honestly denied the license to protect the health and safety of the citizens of Newport, then they acted in good faith and your verdict on Count I must be for the defendants.

Finally, the defendants also claim the plaintiffs breached their contract. If you find there was a breach — i.e., that is the chairs and the generator were out of compliance and if you find that was the actual reason for denying the license, then your verdict must be for the defendants. However, if you find that contractual violations were only a pretext for denying the license, your verdict must be for the plaintiffs.

Count II of the complaint claims that the defendants wrongfully, intentionally and maliciously interferred with the contractual relationships that the plaintiffs had already arranged with other parties. Allegedly, the City officials accomplished this interference by making announcements through the public media including radio and television stations and [8] newspapers that the concert scheduled for August 30 and 31 had been cancelled and that the plaintiffs' license had been revoked. Plaintiffs contend that as a result of this they sustained financial losses from reduced ticket sales and incidental revenue-producing activities.

Members of the Jury, it is an actionable wrong to maliciously interfere with the contractual relations of another. This principle was established in the State of Rhode Island in the case of *Local Dairymen's Association, Inc.* v. *Potvin*, 54 R.I. 430, 433 (1934). In order for the plaintiffs to prevail on this count, first they must show the existence of an actual contract — in this case there is no dispute that the plaintiffs did indeed have a contract with performers for a concert on August 30 and 31. Secondly the plaintiffs must prove through

a preponderance of the evidence that the defendants acted knowingly and maliciously in the interference with the contract. Malicious means that the defendants acted intentionally without justification and with full knowledge that the plaintiffs had an existing contract and with the knowledge of the likely results of their intentional interference. And thirdly, that the damages the plaintiffs suffered were the direct and proximate result of the defendants' conduct.

[9] *Proximate Cause*

I will now instruct you as to proximate cause. Before the plaintifs can recover they must prove the injuries they suffered were proximately caused by the conduct of the defendants as they allege — that is that their injuries were either a direct result or a reasonably probable consequence of the complained of conduct — for if you find such injuries were caused otherwise then, of course, the defendants are not liable. Now members of the Jury, in addition to what I have just told you, there are certain fundamental principles which you must apply in arriving at your conclusion based upon the facts in the case. I instruct you that you are the sole judges of the facts in this case. Your judgment of the facts should be uninfluenced by the Court or counsel, except as you are bound to follow the law of the case as the Court gives it to you.

While you should not permit any invasion of your province to alone judge the facts, arguments of counsel are entitled to respectful consideration. Their arguments should be of considerable aid to you in marshalling the facts in your mind, but you alone are the sole judges of the facts.

[10] *Burden of Proof*

In your deliberation and in arriving at your verdict, you will bear in mind that in an action of this kind, the plaintiffs have the burden of establishing their case by a preponderance of the evidence.

In considering this case, you will examine all of the material evidence in order to determine its relevancy and the true state

of facts. You will weigh all of the evidence in the case so as to reconcile, if possible, such evidence as may be in conflict, and in considering and weighing the evidence, you should use the same judgment, reason, common sense, and general knowledge of men and affairs as you would in everyday life.

*Preponderance of Evidence*

In speaking of the burden of proof, I have referred to the requirement of preponderance of evidence. This is a term which you, no doubt, will understand. It has been defined as that evidence which, after a consideration of all of the evidence, is, in the judgment of the jury, entitled to a greater weight. Stated in another way, the phrase "preponderance of evidence" means that the evidence which points to a certain conclusion appears to the jury to be more credible and probable than the evidence to the contrary. It means such evidence as when weighed with that which opposes [11] it has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests. For example, you have all seen the lady of justice with the scales. If you consider the evidence as weights being placed on each side of the scale — one plaintiffs' and the other defendants' — in order for the plaintiffs to prevail, the weight of the evidence on their side must be such as to tip the scales perceptibly in their favor — as you see it. I trust you all understand that.

*Credibility of Witnesses*

In your consideration of this case, you must also take into account the credibility of witnesses, of which incidentally, you are also the sole judges. With that, the Court has nothing to do.

You may judge the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against any

of the parties, or any circumstance tending to shed light upon the truth or falsity of such testimony, and it is for you to say what weight you will give [12] to the testimony of any and all witnesses.

In viewing the evidence, members of the jury, you must not let prejudice or sympathy influence you in your verdict. You should be guided alone by the evidence and the law of the case as the court has given it to you. Members of the Jury, if you let prejudice or sympathy enter your deliberations, you will be striking a blow at the administration of justice which you and I are sworn to uphold.

*Damages*

I am now going to charge you on the law of damages. The fact that I am talking about damages does not indicate and should not be considered by you as any indication that I favor a verdict in favor of the plaintiffs. The court is neutral and is only interested in helping you find a just and true verdict under the believable evidence. What verdict you find is entirely in your hands. But since I cannot tell how you are going to decide this case and because it is within your province to find a verdict for the plaintiff, it is necessary that you know how to arrive at the amount of the verdict.

Now, as to damages — in this case you may consider awarding compensatory as well as punitive damages as I will [13] explain to you.

First, as to compensatory damages — the plaintiffs are entitled to compensation for all losses which they sustained and which they have established with reasonable certainty. They are entitled to compensation for all lost profits, including those lost on ticket sales, parking and food concessions, and program books. You may award damages (1) for lost profits, as I have just told you, if you find that the plaintiffs lost these profits as a direct result of the defendants' conduct, and (2) that the plaintiffs proved the fact that profits were lost and proved the amount of the lost profits with reasonable certainty, and (3)

that the plaintiffs were sufficiently experienced in the enterprises they were undertaking to assure profits, and (4) that the damages or lost profits could reasonably have been foreseen by the parties to this action at the time the contract was made.

*Punitive Damages*

Now, members of the Jury, you must also consider whether or not you should make an award of punitive damages.

"In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, [14] in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the defendant, which proximately caused actual injury or damage to the plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may if in the exercise of discretion they unanimously choose to do so, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is 'maliciously' done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is 'wantonly' done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is 'oppressively' done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary

harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

[15] Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendant's act or omission, which proximately caused actual damage to the plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case."

Now, in order for you to reach a decision in this case, ladies and gentlemen of the jury, it is necessary for you first to determine what are the facts; to determine from all of the evidence put before you which of the contentions of the adversary parties is the true contention. It is the function of the jury to consider the evidence introduced and to determine therefrom what are the facts. It is [16] the duty of the Court to decide questions of law and to instruct you in the law applicable to the case, but it is for you to apply that law to *the facts* of the case as you, the *jurors*, determine those *facts to be*. Therefore, the factual situation in this case, what actually happened, took

place or transpired in respect to the occurrence or transaction under consideration, this is to be determined by you and by you alone.

Now if during the course of the trial or in giving you these instructions the Court has said or done anything or may say or do anything which indicates to you that the Court is expressing an opinion as to what the facts in this case are, I charge you specifically that the Court has not intended and will not intend to indicate any such opinion. You should not permit such words or acts, if any, to have any influence whatever on your determination, as to what the facts are.

It is understood, however, that in determining what the facts in this case are, you are to consider only that evidence which has been properly placed before you. It is the duty of the Court during the course of the trial to pass upon the admissibility of offered evidence, to decide whether or not offered evidence should be considered by you. Such [17] evidence as the Court admits is properly before you for your consideration. Such evidence as the Court has refused to admit is not a proper subject for deliberations and should not be given consideration by you. By the same token, you have heard it also does not constitute a proper subject for your deliberations and should be ignored and disregarded by you as though you had never heard it at all.

Papers, documents and charts admitted into evidence by the Court are a part of the evidence properly before you and will be available to you in the jury room for consideration during the course of your deliberations. These exhibits are as much a part of the evidence before you as the testimony which you heard from the stand, and you will give each exhibit such weight as in your considered judgment in the entire context of all the facts proven at the trial it deserves.

Now, I have told you this, and I repeat it, remarks or statements made by counsel in your presence during the course of the trial or in argument are not evidence and should not be

considered as such by you during the course of your deliberations. From time to time counsel in arguing to the Court, in arguing to you in final summation may purport to recall what the testimony has been either generally or [18] specifically. I am sure that in this case counsel here would not attempt deliberately to mislead you.

From what I have said I do not and did not mean to imply that you should approach your consideration of this case in an intellectual vacuum. You are not required to put aside or to disregard your experiences and observations in the ordinary, everyday affairs of life; they are essential to your exercise of reasonably sound judgment and discretion in the course of your deliberations; and it is your right and duty to consider the evidence in the light of such experience and observations. It is for this reason that you are required to be at least eighteen years of age before being allowed to serve as a juror in the hope that you will bring into court with you the maturity of experience and God-given common sense, and it is hoped and anticipated that you will sift all of the evidence in this case through that maturity and common sense.

Now, it is required in order for you to return a verdict that your decision be the unanimous decision of all six. You cannot return a verdict either for the plaintiffs or for the defendants unless and until you are in unanimous agreement as to what your verdict shall be.

[19] Therefore, in the course of your deliberations and in your consideration of the evidence you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open to conviction with respect to the point in dispute so that you will not be precluded or prevented from achieving unanimous verdict by mere stubbornness. After all, courts and juries would not be worth very much to the community unless occasionally we decide

something. However, nevertheless, it is your right to maintain your conviction. Each vote of each juror is as important as the vote of any other juror, and you need not give up your conviction sincerely held simply because a majority hold to the contrary view.

It goes without saying, of course, that prejudice, sympathy or compassion should not be permitted to influence you in the course of your deliberations. All that either party here is entitled to, or for that matter expects, is a verdict based upon your fair, scrupulous, and conscientious examination of the evidence and an application thereto of the law as it has been given you by the Court. To yield either to sympathetic impulses or to considerations from [20] prejudice or bias would be to strike a blow at the very cornerstone of the system which you and I are sworn to uphold.

If in the course of your deliberations you should deem it necessary to be further instructed or assisted by the Court in any way, I would ask that you reduce such requests or questions as you may have to writing through your foreman. The foreman may then hand such written requests or questions to the officer in whose charge you will now be placed. The officer will then bring such written question or request to me and I will have you brought into the courtroom and will attempt to fulfill your request or answer the question, as the case may be. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court.

Now, as to damages — where several persons unite in the wrongful act, the extent of individual participation is immaterial for the question of liability. Each is equally liable, jointly or severally. 32 AmJur. 2d, P. 94-95 Sec. 29. You may return a verdict against any one or more of the defendants. In other words, you may find against all of the defendants, or against none of the defendants, or you may [21] find against one or more but less than all of the defendants.

In considering and reporting your award, if any, as to compensatory damages you will report one sum as against the defendant or defendants you might find liable. However, in considering and reporting punitive damages, should you do so, your award, if any, must be considered and reported as against each defendant individually. This is understandable because, as I have explained, punitive damages are based on the degree of culpability of the individual defendant. I further instruct you that as against any one defendant you may find him liable for compensatory damages but not punitive damages. By like token, as to other defendants you may find them liable for both compensatory and punitive damages.

EXHIBIT NO. 1

SPECIAL MEETING OF THE COUNCIL HELD AUGUST 26, 1975.

The CHAIRMAN called the meeting to order at 11:30 a.m. The CITY CLERK called the roll and the following members were present:

| | |
|---|---|
| DONNELLY, Humphrey J., III | NEWSOME, Lawrence E. |
| CARR, Raymond H., Jr. | RING, James F. |
| BEATTIE, Robert O. | WEST, John H. |
| CORISTINE, Edward K. | |

DISCUSSION RE:

ENTERTAINMENT LICENSE OF FACT CONCERT, INC.

MAYOR DONNELLY stated that the Council had just learned of the cancellation of Sarah Vaughan as a performer and the substitution of the group, Blood, Sweat and Tears, and the city does not condone rock festivals.

PHILIP WIENSTEIN, attorney for the concert group, stated they were not considered a rock group and had performed at Carnegie Hall and they were only consisting of 10% of the program, and they had a letter of approval from the Director of Natural Resources.

After a long discussion, pro and con, MAYOR DONNELLY moved that unless Blood, Sweat and Tears was removed from the bill on Sunday, the license for the contract would be cancelled by the City Council.
Seconded by COUNCILMAN CORISTINE and SO VOTED.

ADJOURNED 12:10 p.m.

s/ ROBERT A. SHEA
ROBERT A. SHEA
City Clerk

# EXHIBIT NO. 2

SPECIAL MEETING OF THE COUNCIL HELD AUGUST 29, 1975.

The CHAIRMAN called the meeting to order at 4:28 p.m. The DEPUTY CITY CLERK called the roll and the following members were present:

| | |
|---|---|
| DONNELLY, Humphrey J., III | NEWSOME, Lawrence E. |
| CARR, Raymond H., Jr. | RING, James F. |
| BEATTIE, Robert O. | WEST, John H. |
| CORISTINE, Edward K. | |

ENTERTAINMENT LICENSE AND CONTRACT OF FACT CONCERT, INC.

MAYOR DONNELLY stated the special meeting was called to discuss a possible law suit if the Council did not allow Blood, Sweat and Tears to perform on Sunday's program, and that the Council had two alternatives, either to accept the City Solicitor's opinion to obtain an affidavit from Mr. Amado that no rock music would be allowed, or to cancel the concert altogether.

A discussion ensued between City Solicitor and Mr. Salier relative to a telephone conversation they had.

CITY SOLICITOR O'BRIEN suggested the Council allow Blood, Sweat and Tears to perform as long as they do not play rock music and if they draw a troublesome crowd, that all costs be born by Fact Concerts Inc. for extra policemen and in this way would be protected from suit.

COUNCILMAN CARR asked the City Manager if all sections of the contract had been fulfilled. by Fact Concerts Inc.

CITY MANAGER PERRY stated that he examined the site after 3:00 p.m. He was unable to observe the auxiliary generator and the wiring of the seats together was in progress and not completed by the deadline of the contract. The chairs were being put together with tape rather than wire.

Discussion by COUNCILMEN CARR, CORISTINE, NEWSOME, WEST, DONNELLY and CITY SOLICITOR relative to contract violations and why paragraph was left out of present contract giving Council right to approve what would appear on the program.

MAYOR DONNELLY stated that if Fact Concert, Inc. is in violation of the contract, the Council should cancel it and give Mr. Amado the opportunity to enter into a new contract.

Discussion by MR. AMADO, COUNCILMEN NEWSOME, CITY SOLICITOR, CITY MANAGER, COUNCILMAN CORISTINE relative to cancellation.

COUNCILMAN CARR moved to cancel the contract with Fact Concert, Inc. because they have not lived up to all phases of the contract. Seconded by COUNCILMAN CORISTINE.

Discussion by COUNCILMEN CORISTINE, WEST, NEWSOME and MAYOR DONNELLY.

MOTION ADOPTED. 7 in favor.

MAYOR DONNELLY moved to recess the meeting for one-half hour. Seconded by COUNCILMAN CORISTINE and SO VOTED.

RECESSED at 5:05 p.m.

RECONVENED at 6:25 p.m.

MAYOR DONNELLY moved to recess the meeting until 8:30 p.m. Seconded by COUNCILMAN CORISTINE and SO VOTED.

RECONVENED at 8:40 p.m.

MAYOR DONNELLY explained the meeting was recessed to give Fact Concert, Inc. the opportunity to discuss situation with its attorneys.

MR. WEINSTEIN discussed Fact Concert position, that they needed more time to contact other attorneys and backers, and if the Council stops the concert, suit will be instituted.

MAYOR DONNELLY stated the concert is cancelled because you did not live up to the contract.

Discussion by MAYOR DONNELLY, CITY SOLICITOR and MR. WEINSTEIN.

MR. WEINSTEIN asked they be allowed until 10:00 p.m. to make decision.

COUNCILMAN BEATTIE moved to give Fact Concert, Inc. until 9:30 p.m. out of courtesy. Seconded by COUNCILMAN CARR. SO VOTED.

RECESSED at 8:55 p.m.

RECONVENED at 9:27 p.m.

MR. WEINSTEIN thanked the Council for its time and the only remedy they have is to litigate the contract and he would see them in court.

MAYOR DONNELLY moved to adjourn. Seconded by COUNCILMAN CARR and SO VOTED.

ADJOURNED 9:28 p.m.

s/ JANE A. MCMANUS,
JANE A. MCMANUS,
Deputy City Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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[Title Omitted in Printing]

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## DEFENDANTS' MOTION FOR JUDGMENT N.O.V. OR IN THE ALTERNATIVE FOR A NEW TRIAL

Now come the defendants and file this motion for judgment non obstante verdicto, or in the alternative for a new trial. The defendants move that the verdicts be set aside; that the judgments entered on the verdicts be vacated and set aside; and that an order be entered staying execution pending a further order of this Court. The defendants move for entry of judgments n.o.v. in accordance with the Federal Rules of Civil Procedure, particularly Rule 50 (b) and that judgment be entered in accordance with these motions as this Court may be determined as the jury verdicts and judgments entered thereon are contrary to the law and to the evidence and to the weight of the evidence.

This motion is entered in addition to the defendants' motion for a new trial heretofore filed on the grounds that the verdicts are against the law and the evidence and the weight thereof and that the verdicts are excessive and a result of passion and prejudice.

By their Attorneys,

s/ GUY J. WELLS
GUY J. WELLS
GUNNING, LAFAZIA & GNYS, INC.
410 Turks Head Building
Providence, Rhode Island

s/ FREDERICK W. FAERBER, JR.
City Hall
Newport, Rhode Island

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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[Title Omitted in Printing]

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## REMITTITUR

Fact Concerts, Inc. and Marvin Lerman, the Plaintiffs in the above-entitled matter hereby accept the remittitur ordered by the Court on page 14 of the Opinion and Order dated July 2, 1979, thereby reducing that portion of the award of punitive damages rendered against the Defendant City of Newport from $200,000.00 to $75,000.00.

By their Attorneys,

s/ LEONARD DECOF
LEONARD DECOF
DECOF, WEINSTEIN & MANDELL
500 Howard Building
Providence, Rhode Island 02903

Supreme Court, U.
FILED
OCT 14 1980
MICHAEL RODAK, JR.

No. 80-396

# In the Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity
as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in Their Official Capacity
as Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

LEONARD DECOF
DECOF & GRIMM
1 Smith Hill
Providence, Rhode Island, 02903
(401-272-1110)
*Attorney for Respondents*

*Of Counsel:*
JAY S. GOODMAN

Blanchard Press, Inc., Boston, Mass.—Law Printers

## QUESTIONS PRESENTED

1. Should This Court Consider Whether a Municipality is Liable for Punitive Damages in a Section 1983 Case When Defendants Failed to Object to the Charge; There is no Conflict in the Circuits; and the Decision Below Was Clearly Right?

2. Should This Court Exercise Its Power of Supervision on a Purely Evidentiary Matter Where Defendants Objected Only Sporadically; the Testimony Was Perfectly Proper Under Rule 611(b); and Two Courts Below Carefully Considered the Questions?

3. Should This Court Exercise Its Power of Supervision Where the United States Court of Appeals for the First Circuit's Approval of the District Court's Denial of Motions for a Judgment N.O.V. was Clearly Correct in Its Interpretation of First and Fourteenth Amendment Claims Under Section 1983?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | I |
| Statement of the Case | 2 |
| Reasons for Denying the Writ | |
| I. Petitioners Failed to Object to the Punitive Damages Instruction and Hence Cannot Now Raise the Issue; In Addition There Exists No Conflict in the Circuits and the Decisions Below Are Clearly Correct; Therefore This Court Should Not Issue Its Writ on the Issue of Punitive Damages Against Municipalities Under Section 1983 | 8 |
| A. Petitioners failed to object | 8 |
| B. There is no confict in the circuits | 10 |
| C. The decisions below are clearly correct | 10 |
| II. Petitioners Failed to Object During Cross-Examination and Closing Argument and Hence Cannot Object Now; In Addition the Testimony was Perfectly Proper Under Fed. R. Evid. 611(b) and the Particular Sequence of This Trial; and Two Courts Below Carefully Considered All of the Questions | 12 |
| A. Petitioners failed to object | 12 |
| B. The cross-examination and closing argument were perfectly proper | 13 |
| C. Two courts below carefully considered the questions | 15 |
| III. Both Courts Below Were Clearly Correct in Their Interpretation of First and Fourteenth Amendment Claims Under Section 1983, and Therefore This Court Should Not Exercise Its Supervisory Power | 15 |
| Conclusion | 17 |


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## TABLE OF AUTHORITIES

*Cases:*


| | Page |
|---|---|
| *Alford* v. *United States*, 282 U.S. 687 (1931) | 13 |
| *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) | 16 |
| *Atallah* v. *B.H. Hubbert & Son*, 168 F.2d 993 (9th Cir. 1948), *cert. denied, sub nom; Cingrigrani* v. *B.H. Hubbert & Son*, 335 U.S. 868 (1948) | 11 |
| *Aumiller* v. *University of Delaware*, 434 F. Supp. 1273 (D.C. Del. 1977) | 10 |
| *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2nd Cir. 1948), *cert. denied* 335 U.S. 887 (1948) | 11 |
| *Bradshaw* v. *Zoological Society of San Diego*, 569 F.2d 1066 (9th Cir. 1978) | 10 |
| *Carey* v *Piphus*, 435 U.S. 247 (1978) | 10, 17 |
| *Carlson* v. *Green*, 100 S.Ct. 1468 (1980) | 10 |
| *Darr* v. *Mutual Life Insurance Co.*, 169 F.2d 262 (2d Cir. 1948), *cert. denied*, 335 U.S. 871 (1948) | 11 |
| *Douglas* v. *Cotty of Jeanette*, 319 U.S. 157 (1943) | 15 |
| *Fisch* v. *General Motors Corp.*, 169 F.2d 266 (6th Cir. 1948) *cert. denied*, 335 U.S. 902 (1949) | 11 |
| *Fulton Market Cold Storage* v. *Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied* 439 U.S. 1121 (1979) | 10 |
| *Graver Mfg. Co.* v. *Linde Co.*, 331 U.S. 271 (1948) | 15 |
| *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) | 16 |
| *Luther* v. *Borden*, 7 Howard 1 (1849) | 11 |
| *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978) | 8 |
| *Morris* v. *Travisano*, 528 F.2d 856 (1st Cir. 1976) | 8 |
| *Owen* v. *City of Independence, Mo.*, 100 S.Ct. 1398 (1980) | 11 |
| *Paul* v. *Davis*, 424 U.S. 693 (1976) | 16 |
| *Simineo* v. *School Dist. No. 16, Park Cty. Wyo.*, 594 F.2d 1353 (10th Cir. 1979) | 10 |

Page

*Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546 (1975) ..... 15

*Stepping Stone Enterprises, Ltd.* v. *Andrews*, 531 F.2d 1 (1st Cir. 1976) ..... 16

*Tla-Koo-Yel-Lee* v. *United States*, 167 U.S. 275 (1896) ... 13

*United States* v. *Kartman*, 417 F.2d 893 (9th Cir. 1969) .. 13

*Williams* v. *City of New York*, 508 F.2d 356 (2d Cir. 1974) ..... 9

*Younger* v. *Harris*, 401 U.S. 37 (1971) ..... 11

# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-396

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity
as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in Their Official Capacity
as Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The respondents in the above-entitled matter submit that the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") should be denied. The respondents concur in the

petitioners' statements under the headings *Opinions Below*, *Jurisdiction*, and *Constitutional and Statutory Provisions Involved* in the Petition. The Appendices to the Petition (hereinafter "Pet. App.") are incorporated herein by reference.

## Statement of the Case

The United States District Court for the District of Rhode Island had jurisdiction of this matter by virtue of 28 U.S.C. Secs. 1331 and 1343(3).

In the early summer of 1975, Plaintiff Fact Concerts, Inc. (Fact Concerts) through its President Frank Amado (Amado) and Plaintiff Marvin Lerman (Lerman) discussed holding a two-day jazz festival in the City of Newport. Amado had previously obtained a lease from the Rhode Island Department of Natural Resources to hold three concerts in Fort Adams, and he then sought licenses from the City of Newport.

Amado obtained a license from the City of Newport and successfully staged a first concert featuring Arthur Fiedler. Amado had also applied for, in May, 1975, and been granted a license by the City Council for two jazz concerts to be given at Fort Adams on August 2nd and 3rd. Subsequently, the Plaintiffs successfully sought a substitution of August 30 and 31 from the Council, which granted a license through a contract dated August 22, 1975 and duly authorized it by vote. The contract did not grant the City the right to approve performers who would appear, nor did it designate the type of music to be played, referring only to a "music concert." The city retained the right to cancel only "if the interests of public safety demand."

Plaintiffs began in the summer of 1975 to book top jazz acts. However, one attraction, Sarah Vaughan, was unavailable, and Plaintiffs substituted an alternative group called Blood, Sweat and Tears. This group triggered the events at the heart of the case. Plaintiffs considered Blood, Sweat and Tears a jazz

group equivalent in stature to Sarah Vaughan, based upon the group's appearance in Carnegie Hall, representing the United States on State Department-sponsored jazz tours, and appearing at major jazz festivals. Plaintiffs advertised the jazz concerts, including an August 24, 1975 ad in *The New York Times*, announcing the addition of Blood, Sweat and Tears.

On the Monday before the concerts, Amado received notice of a problem. He called Mayor Donnelly, who talked about cancellation of Blood, Sweat and Tears because he did not want any rock groups appearing in Newport. The next day Fact Concerts officials attended a special City Council meeting. The Fact Concerts group was told that Blood, Sweat and Tears would have to be removed or the license would be revoked. The Mayor said that Blood, Sweat and Tears would bring a long-haired element that the City did not want. A Fact Concerts spokesman explained that Blood, Sweat and Tears was a jazz group, but this information was rejected.

The official minutes of the Special Meeting of the Council held August 26, 1975, between 11:30 a.m. and 12:10 p.m. reflect "DISCUSSION RE: ENTERTAINMENT LICENSE OF FACT CONCERTS, INC." and record that:

> MAYOR DONNELLY stated that the Council had just learned of the cancellation of Sarah Vaughan as a performer and the substitution of the group, Blood, Sweat and Tears, and the city does not condone rock festivals.
>
> PHILIP WEINSTEIN [*sic*], attorney for the concert group, stated they were not considered a rock group and had performed at Carnegie Hall and they were only consisting of 10% of the program.
>
> After a long discussion, pro and con, MAYOR DONNELLY moved that unless Blood, Sweat and Tears was removed from the bill on Sunday, the license for the contract would be cancelled by the City Council. Seconded by COUNCILMAN CORISTINE and SO VOTED.

At the time of this vote, and subsequently, neither the Mayor nor any member of the City Council undertook any investigation of the type of music played by Blood, Sweat and Tears. Blood, Sweat and Tears had appeared at a 1969 Newport Jazz Festival without incident and had not even been on the program at a 1971 jazz festival in which incidents did occur! It would have been an easy matter, moreover, for such an investigation to be carried out.

After the Council meeting of the 26th, Fact Concerts decided to accept the Council decision and go forward without Blood, Sweat and Tears. Fact Concerts hired a substitute group called Weather Report. The Council's action, meanwhile, generated negative publicity and uncertainty among potential concertgoers, devastating ticket sales.

Then, on Thursday, August 28th, Amado received a call from Newport City Solicitor James O'Brien informing him that the Council had changed its mind and would let Blood, Sweat and Tears play on the bill if they did not play rock and roll. Fact Concerts then rehired Blood, Sweat and Tears and agreed to attend a meeting the next day with the City Council. This changeabout occurred because O'Brien had informed the Mayor and some or all of the councilmen that they did not have the right to approve or disapprove of who played on the program and that they were, therefore, subject to suit. Newspaper stories indicated that Blood, Sweat and Tears threatened to sue the City for large amounts for damage to their character.

The August 29th special meeting of the Council, entitled in the minutes, "ENTERTAINMENT LICENSE AND CONTRACT OF FACT CONCERTS, INC.", began at 4:28 p.m. Mayor Donnelly said the Council could either accept the City Solicitor's opinion and obtain an affidavit from Amado that no rock music would be allowed, or cancel the concert entirely. However, no affidavit was ever presented to Amado or anyone from Fact Concerts, nor were Plaintiffs ever asked to draw up any kind of affidavit.

City Manager Perry visited the site at the direction of the Council with the intent of seeing if Fact Concerts lived up to the letter of the contract. City Manager Perry stated that he had examined the concert site after 3:00 p.m., set-up time, and was unable to observe the auxiliary generator required by the contract. Perry also stated that the wiring together of the seats was in progress and not completed by the 3:00 p.m. deadline and that the chairs were being put together with tape rather than wire.

Perry reported noncompliance despite the fact that the remaining 500 of the 7,000 chairs would have been attached within fifteen minutes to half an hour of 3:00 p.m., and in the face of comments to him on the Fort Adams scene by Rhode Island Director of Natural Resources Dennis Murphy that the remaining chairs would be firmly secured within a very short period of time and that his complaint was frivolous. In addition, the chairs were not loose, but were all in banks of twelve and the professional tape being used was safer and stronger than wire. In addition, the generator required had been rented from the Newport Fire Department and was installed. Perry apparently overlooked it.

At the special meeting, Mayor Donnelly stated that if Fact Concerts was in violation of the contract, the Council should cancel it and give Mr. Amado the opportunity to enter into a new contract. After discussion, Councilman Carr moved to cancel the contract because Fact Concerts had not "lived up to all phases of the contract," which motion was adopted unanimously.

During a recess, the Fact Concerts group consulted on whether to sign an altenative contract offered to them by the Mayor and the City Council which would have allowed the concert to go on, but without Blood, Sweat and Tears. This offer was made notwithstanding anything about the chairs or generator. When the special meeting reconvened at 8:40 p.m. on August 29th, Fact Concerts' attorney informed the City Council that suit would be instituted if the concert were

stopped. Mayor Donnelly replied that the concert was cancelled because Fact Concerts did not live up to the contract.

During the special meeting, no reports by city officials relative to problems with public safety were made, according to the minutes, nor do the minutes show the presence of the Chief of Police or the Fire Chief, who might have been expected to be present if public safety was a major concern. The Mayor had no recollection of such persons being present. City Manager Perry could not produce any reports nor remember any specific content of any such reports from any such official. While the councilmen later at trial characterized themselves as concerned with public safety, the minutes of the special meeting taken at the time make absolutely no mention of any concern with public safety, nor in meeting their burden at trial of making a "good faith" defense did Appellants produce any contemporaneous documentary evidence of concern for public safety.

An announcement that the contract was cancelled and the concerts were off was made after the special meeting. The news of the concert license revocation appeared widely that night over local media. Fact Concerts appeared before Judge Orton of the Rhode Island Superior Court the next morning, and at 9:30 obtained an order restraining the City of Newport, and the concert went on. Blood, Sweat and Tears performed without incident. Over the two days of the concerts, only 6,308 of the available 14,000 tickets were sold (7,000 maximum for each day), and the event showed a loss of $72,910.00.

Fact Concerts, Inc. and Lerman brought a five count complaint in the United States District Court for the District of Rhode Island seeking declaratory relief, compensatory and punitive damages for violations of First and Fourteenth Amendment rights, and compensatory and punitive damages for three pendant state law claims. The complaint asserted that the action arose under the First and Fourteenth Amend-

ment and under 42 U.S.C. §1983, with District Court jurisdiction under 28 U.S.C. §1331 and §1343(3) over the federal claims and through pendant jurisdiction over the state claims.

The case came to trial beginning on January 16, 1979, before Chief Judge Raymond J. Pettine and a jury. After five days of trial testimony, the case was given to the jury on January 25, 1979. The trial judge sent two counts of the complaint to the jury. The civil rights violations under the First and Fourteenth Amendments and 42 U.S.C. §1983 for the revocation of the license became Count I. The action for interference with contractual relationships through announcements in public media that the events had been cancelled became Count II.

The jury returned verdicts for Plaintiffs on both counts and assessed compensatory damages against all Defendants in the amount of $72,910.00. The jury awarded punitive damages against the City of Newport in the amount of $200,000.00; $20,000.00 punitive damages against Mayor Donnelly; $20,000.00 punitive damages against Councilman West; $10,000.00 punitive damages against Councilmen Carr, Coristine, and Newsome; and $5,000.00 punitive damages against Councilmen Beattie and Ring.

In his Opinion and Order dated July 2, 1979, (Pet. App. B), Judge Pettine denied Defendants' Motion for Judgment Notwithstanding the Verdict. As to Defendants' Motion for a new trial, the court ordered a remittitur, setting $75,000.00 as the maximum permissible punitive damages awarded against the City. Plaintiffs accepted the remittitur on July 9, 1979. Defendants appealed and the Court of Appeals for the First Circuit affirmed on June 17, 1980 (Pet. App. A).

## Reasons for Denying the Writ

I. PETITIONERS FAILED TO OBJECT TO THE PUNITIVE DAMAGES INSTRUCTION AND HENCE CANNOT NOW RAISE THE ISSUE; IN ADDITION THERE EXISTS NO CONFLICT IN THE CIRCUITS AND THE DECISIONS BELOW ARE CLEARLY CORRECT; THEREFORE THIS COURT SHOULD NOT ISSUE ITS WRIT ON THE ISSUE OF PUNITIVE DAMAGES AGAINST THE MUNICIPALITIES UNDER SECTION 1983.

### A. *Petitioners Failed To Object*

Petitioners admit they failed to preserve their objection to the trial judge's charge on punitive damages. (Pet. at 8). Fed. R. Civ. P. 51 explicitly bars appeal on issues not objected to, and that rule is strictly adhered to because of the policies of fairness and judicial economy it incorporates. *Morris* v. *Travisano*, 528 F.2d 856, 859 (1st Cir. 1976).

Petitioners now maintain that the liability of a municipality for any damages was a new principle of law at the time of trial and that therefore their counsel's failure to object should be overlooked. (Pet. at 9). In fact, Petitioners' counsel had ample notice that punitive damages were specifically an issue in the case. Respondents' complaint (R.A. 9) and amended complaint (R.A. 23) discussed punitive damages. Respondents' pretrial memoranda discussed punitive damages as well as *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978). During trial, the judge reminded counsel that there was a prayer for punitive damages (Transcript Vol. III, p. 115) and Respondents' counsel prepared a Memorandum on the Availability of Punitive Damages Against a Municipal Corporation, at the judge's request (made to both sides in chambers), which was hand delivered to Petitioners' counsel on the last day of the trial. The trial judge specifically invited defendants' counsel to object at the end of instructions (R.A. 591-B). It mocks the language of Fed. R. Civ. P. 51 to suggest that it should not apply in this case.

There is no miscarriage of justice here, *Fact Concerts* bears no resemblance to *Williams* v. *City of New York*, 508 F.2d 356 (2nd Cir. 1974), a pre-*Monell* case with extreme facts relied upon by Petitioners, in which the court did set aside Rule 51 and an award of punitive damages against the City of New York. In that case, an action for malicious prosecution in a murder, there was an absence of any nexus between anyone in authority in the police department and the acts complained of by the Plaintiff, *id.* at 361. Most important, because twenty-five years intervened between the tortious act and the award, and the standards for admissibility of evidence changed, there was no evidence that practices of the sort complained of continued. Without proof that the City no longer required the deterrent medicine of punitive damages, the court was reluctant to grant it.

Here petitioners acted on behalf of the City by formal vote in denying a license, despite advice that they did not have the authority to approve or disapprove content from their City Solicitor. (R.A. 270-271). In addition to this factual nexus between the City and the individual Defendants, deterrence was urgently required. This case marked the second time within a few years that a First Amendment violation had been pressed against the Newport City Council, an injunction previously having been necessary from Federal District Court to allow a peaceful demonstration in a public park. (R.A. 305-KK-LL).

Councilman West (R.A. 461), Coristine (R.A. 505-506), and Newsome (R.A. 537) were on the council and recalled the earlier so-called Tiger Cage case when asked about it at trial. Councilman Ring and Mayor Donnelly were on the council at the time the federal injunction was issued. (R.A. 525; R.A. 208). Thus, this council and these councilmen had full knowledge of the protected nature of speech and, notwithstanding that, went forward to cancel the Fact Concerts license. Clearly, on the facts, it cannot be said that the unobjected-to instructions were a miscarriage. The instruc-

tions met the purpose of punitive damages, to vindicate the public interest in deterring malicious or wanton conduct by public officials, and to do whatever is necessary to reasonably deter such conduct in the future. *Aumiller* v. *University of Delaware*, 434 F. Supp. 1273, 1312 (D.C. Del. 1977).

B. *There Is No Conflict in the Circuits*

Even if Petitioners properly preserved their objections, this Court should not grant its writ. There is no conflict among the circuits that have considered the availability of punitive damages against local governments, Supreme Court Rule 17.1(a).[1] Thus, in addition to the instant case in the First Circuit, post-*Monell* decisions have all allowed punitive damages. *Fulton Market Cold Storage* v. *Cullerton*, 582 F.2d 1071, 1073 (7th Cir. 1978), *cert. denied* 439 U.S. 1121 (1979); *Bradshaw* v. *Zoological Society of San Diego*, 569 F.2d 1066, 1068 (9th Cir. 1978); and *Simineo* v. *School Dist. No. 16, Park Cty., Wyo.*, 594 F.2d 1353, 1357 (10th Cir. 1979).

C. *The Decisions Below Are Clearly Correct*

Petitioners seek the writ, however, under Supreme Court Rule 17.1(c), maintaining that an important question of federal law has not been, but should be settled by this Court. While the Supreme Court has not addressed punitive damages against a municipality directly, it has stated that ". . . punitive damages are available in 'a proper' §1983 action." *Carlson* v. *Green*, 100 S. Ct. 1468, 1473 (1980), *citing*, *Carey* v. *Piphus*, 435 U.S. 247, 257 n.11 (1978). There is no need for this Court to go beyond that pronouncement. The

[1] Petitioners imply (Pet. at 10) that the award against the individual officials is also now challenged. But this issue is not listed in their "Questions Presented," nor briefed or argued. Hence, it is not properly before this Court.

decisions below are clearly correct, and therefore there is no need to review the issue. This is the policy followed by the Court on other constitutional issues, such as the Portal to Portal Act of 1947, 29 U.S.C. 251 *et. seq.* (1947). See: *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2nd Cir. 1948), *cert. denied* 335 U.S. 887 (1948); *Fisch* v. *General Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), *cert. denied* 335 U.S. 902 (1949); *Atallah* v. *B. H. Hubbert & Son*, 168 F.2d 993 (9th Cir. 1948), *cert. denied sub nom.*; *Ciangrigrani* v. *B. H. Hubbert & Son*, 335 U.S. 868 (1948); and *Darr* v. *Mutual Life Insurance Co.*, 169 F.2d 262 (2nd Cir. 1948), *cert. denied*, 335 U.S. 871 (1948).

The policy arguments raised by Petitioners (Pet. at 10-13) have all been recently considered and rejected by this Court in its extended discussion of the rationale for damages under Section 1983 in *Owen* v. *City of Independence, Mo.*, 100 S. Ct. 1398 (1980). The *Owen* court stated: ". . . a municipality has no 'discretion' to violate the Federal Constitution . . . And when a court passes judgment on the municipality's conduct in a §1983 action, it does not seek to second-guess the 'reasonableness' of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Id.* at 1415.

Thus, *Owen* specifically considers and rejects Petitioners' arguments that somehow the Newport government and its officials are not subject to §1983 actions, (Pet. at 12-13). Petitioners rely, incredibly, on *Luther* v. *Borden*, 7 Howard 1 (1849) and *Younger* v. *Harris*, 401 U.S. 37 (1971). Furthermore, while *Owen* does not deal with punitive damages specifically, the Court adopts the appropriate rationale behind punitive damages when it states that, "Moreover, §1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Id.* at 1416.

The *Owen* reasoning applies perfectly to the public policy reasoning behind an award of punitive damages; to deter future bad conduct. And, when public officials and the local government repeatedly violate constitutional rights and a punishment to deter is needed, it is not inappropriate that taxpayers bear the burden imposed upon the government. *Owen* rejects Petitioners' argument (Pet. 10-11) to the contrary. *Owen* holds that since the public at large enjoys the benefits of government activities, it is the public at large which is ultimately responsible for its administration. *Id.* at 1417. Such burdens are part of the "inevitable costs of government borne by all the taxpayers." *Id.* at 1417.

Accordingly, because there is no conflict in the circuits and because the decisions below are clearly correct, certiorari should not be granted on the §1983 punitive damages issue.

## II. Petitioners Failed To Object During Cross-examination and Closing Argument and Hence Cannot Object Now; In Addition the Testimony Was Perfectly Proper Under Fed. R. Evid. 611(b) and the Particular Sequence of This Trial; and Two Courts Below Carefully Considered All of the Questions.

### A. *Petitioners Failed To Object*

Petitioners failed to preserve their objections at trial. Their assertion that testimony was admitted "over objections" (Pet. at 13) distorts the record. On Questions 141-152 (R.A. 462-463), referred to at Pet. 14, first paragraph, Petitioners objected only to Q.141 and Q.152 and to none in between. On Questions 203-208 (Pet. at 14), Petitioners only objected to Q.206. No objections were made to the closing arguments (R.A. 562-591). Fed. R. Evid. 103(a)(1) bars raising upon appeal matters not objected to at trial. The First Circuit noted that allegations now appear "in a light clouded by the defendants' failure to object at trial" (Pet. App. A-2) and that the cross-examination was "objected [to] only sporadically." (Pet. App. A-13).

B. *The Cross-examination and Closing Argument Were Perfectly Proper*

Fed. R. Evid. 611(b) permits cross-examination into matters affecting the credibility of any witness. The trial court has no obligation imposed on it to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination. *Alford* v. *United States*, 282 U.S. 687, 694 (1931). Questions directed toward showing material facts bearing upon the character and credibility of the witness are admissible. *Tla-Koo-Yel-Lee* v. *United States*, 167 U.S. 275, 277 (1896). The law recognizes the force of a hostile emotion as influencing the probability of truthtelling, and a partiality of mind is therefore always relevant as discrediting the witness and affecting the weight of his testimony. *United States* v. *Kartman*, 417 F.2d 893, 897 (9th Cir. 1969).

In the instant case, cross-examination occurred only after Petitioners, using Mr. West as their key witness, began a "good faith defense," and only after Respondents' counsel put on the record that if the good faith evidence went in, this exact line of cross-examination would follow to show bad faith. Because the sequence is vital, the First Circuit reproduces at length the record surrounding the cross-examination, Pet. at A-9-13. After a close and careful review of the testimony and special circumstances, the First Circuit found West a "hostile, ascerbic witness . . . His credibility was fair game, Fed. R. Evid. 611(b) . . ." (Pet. App. A-13). West's voluntary statements were probative of whether his testimony would be of the objective nature required of experts.

Petitioners misstate the evidence as to the closing argument. In twenty of twenty-two references to West, Respondents'

counsel mentioned only some other aspect of the case and not the challenged material.[2]

None of the alleged comparisons were made. References to Hitler and the Watergate came in an analysis of how public safety rationalizations had been used by governments historically. Reference to Mr. West occurs in a completely separate paragraph. (R.A. 564). Counsel drew no connection to George Lincoln Rockwell, and mentioned Mr. West in a different paragraph entirely (R.A. 565).

No one called West a bully. Respondents' counsel said "whether he's smart, whether he's a bully . . ." in connection with how West had a lot to say. (R.A. 569). Counsel nowhere used the words "male chauvinist", but simply and accurately

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[2] R.A. 563—West exemplifies the City Council.
R.A. 564—refers to West in context of the public safety defense and as an intelligent man.
R.A. 565—West very determined but frustrated.
R.A. 569—discusses West in the context of license denial process.
R.A. 570—reviews West's statements to press and testimony as to his own deposition.
R.A. 574—discusses West's words, "I'd do it again" as bearing on good faith.
R.A. 575—mentions West in reference to the Tiger Cage case.
R.A. 577—reports that West did not volunteer in his long direct testimony that Blood, Sweat and Tears did not even appear at the 1971 festival where there was a problem.
R.A. 578—analyzes contradictions in West's testimony and deposition.
R.A. 580—West's testimony indicates how difficult it would be to reason with him.
R.A. 583—Newsome, like West, at first maintained his deposition was not correct.
R.A. 584—at trial, West offered expert opinions on music, police, law and contracts.
R.A. 588—West felt he was right in his conduct no matter what.
R.A. 590—it was marvelous that West had his full say even if what he said shocked people, because this indicates the strength of free speech in the United States.

recited what Mr. West said about Attorney Elizabeth Rode, absolutely proper evidence going to credibility. (R.A. 579).

### C. *Two Courts Below Carefully Considered the Questions*

The trial court carefully considered the evidentiary issues in the context of the defense before they were asked, (R.A. 422-423), as well as when the questions were actually asked and sporadically objected to. The appellate court fully considered the challenged evidence and paid particular attention to the special circumstances of the case. (Pet. App. A. 8-13). Thus, two courts have fully considered and correctly decided these issues, in which only questions of evidence and not issues of law are involved. Therefore, these matters are not proper ones for exercise of certiorari. Just as this Court does not undertake to review findings of fact by two courts below, in the absence of a "very obvious and exceptional showing of error," it should not here review evidentiary findings by two courts below. *Graver Mfg. Co.* v. *Linde Co.*, 331 U.S. 271, 275 (1948).

## III. Both Courts Below Were Clearly Correct in Their Interpretation of First and Fourteenth Amendment Claims Under Section 1983, and Therefore This Court Should Not Exercise Its Supervisory Power.

The law is quite clear as to Plaintiffs' cause of action. Both courts below fully considered and correctly decided this issue. (Pet. App. A and B). The First Amendment is incorporated into the Fourteenth Amendment. *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943). Music and musical productions are speech and are not to be subject to a standard drastically different from that applied to any other form of protected First Amendment communication. *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 557-558 (1975) (overturning local

board's denial of a license to rock musical "Hair" to perform in municipal auditorium). Indeed, the *Southeastern Promotions* Court stated:

> The basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. Citing: *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952).

*Id.* at 558.

Petitioners' citation of *Paul* v. *Davis*, 424 U.S. 693 (1976) (Pet. at 17) is inapposite because Respondents here point to a specific constitutional guarantee safeguarding the violated interest. Respondents rely upon the specific guarantees of the First Amendment, damage to their reputation being derivative from Petitioners' violation of their basic, explicit, and clearly protected free speech rights.

*Arnett* v. *Kennedy*, 416 U.S. 134 (1974), oddly relied upon by Petitioners (Pet. at 17), also has no bearing upon the instant case. *Arnett* held only that in federal employment cases, where the terms were created by statute, the Constitution did not create independent and greater rights. But respondents' claims here are to protected speech, not a federal job.

Respondents' claim is that Defendants violated their protected free speech rights by cancelling the concert for no other reason than content. Respondents do not claim as Petitioners suggest that the First Amendment guarantees every commercial promoter a profit. What the First Amendment guarantees is the right, consistent with reasonable regulations reasonably applied as to public health and safety, *Stepping Stone Enterprises Ltd.* v. *Andrews*, 531 F.2d 1, 3 (1st Cir. 1976), to produce a program without interference with the content. Where the content is unconstitutionally interfered with, as here, and damages result from those intentional acts, as here, liability

results. While the concerts went on, under injunction, Defendants' intentional acts caused monetary losses. Petitioners' argument that because the event went on under court order they cannot be liable for damages amounts to asking for an open license on unconstitutional behavior whenever, in the end, the unconstitutional scheme is only partially successful.

The Court of Appeals for the First Circuit correctly rejected Petitioners' position by noting (Pet. App. A-6, 7) that their ". . . somewhat ingenious argument ignores the fact that Section 1983 provides that violators shall be liable . . . for redress and that the Supreme Court has to construe Section 1983 to comprehend, at the least, the payment of compensatory damages. *Carey* v. *Piphus*, 435 U.S. 247, 254-57 (1978)." The Circuit Court also found that this issue may be moot, because the jury's verdict does not indicate whether the compensatory damages were awarded under the §1983 count or the pendant count. (Pet. App. A-7).

## Conclusion

For all of these reasons, this Court should not issue a Writ of Certiorari to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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October, 1980

No. 80-396

# In the Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## BRIEF FOR THE PETITIONERS

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# I

## Question Presented

IS A MUNICIPALITY LIABLE FOR PUNITIVE DAMAGES IN A SECTION 1983 CASE?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | 1 |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | 3 |
| Summary of Argument | 7 |
| I. Historic | 7 |
| II. Legal | 9 |
| Argument | 10 |
| I. The Historic Background of the Immunity | 11 |
| II. The Legal Rationale of the Immunity | 17 |
| III. The Failure To Make Objections to the Trial Judge's Charge on Punitive Damages | 27 |
| Conclusion | 29 |


### Table of Citations

**Cases**


*Barry* v. *Edmunds*, 116 U.S. 550 (1885) ..... 18, 19
*Batista* v. *Weir*, 340 F.2d 74 (3rd Cir. 1965) ..... 25
*Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir. 1968), *cert. denied*, 393 U.S. 940, 89 S.Ct. 299 ..... 17
*Chappell* v. *City of Springfield, Mo.*, 423 S.W.2d 810 (1968) ..... 26
*Charles E. Smith, Jr.* v. *District of Columbia*, D.C. App. 336 A.2d 831 (1975) ..... 26
*Chicago* v. *Langlass*, 52 Ill. 256, 4 Am. Rep. 603 (1869) ..... 7, 12, 13
*Chicago* v. *Martini*, 49 Ill. 241, 95 Am. Dec. 590 (1868) .. 7
*City Council of Montgomery* v. *Gilmer & Taylor*, 33 Ala. 116, 70 Am. Dec. 562 (1958) ..... 7, 13


PREVIOUS PAGE WAS BLANK

Page

*City of Gary* v. *Falcone*, 169 Ind. App. 295, 348 N.E.2d 41 (1976) ..... 26

*Cole* v. *City of Houston*, 442 S.W.2d 445 (Tex. Civ. App. 1969) ..... 26

*Des Forge* v. *West St. Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950) ..... 26

*Electric Workers* v. *Foust*, 442 U.S. 42 (1979) ..... 24, 25

*Ferrara* v. *Sheraton McAlpin Corp.*, 311 F.2d 294 (2nd Cir. 1962) ..... 28

*Fisher* v. *City of Miami*, 172 So. 2d 455 (Fla. 1965) ..... 26

*Foss* v. *Maine Tpke. Auth., Me.*, 309 A.2d 339 (1973) ... 26

*Fulton County* v. *Baranan*, 240 Ga. 837, 242 S.E.2d 617 (1978) ..... 26, 28

*Herfurth* v. *Corporation of Washington*, 6 Dist. Col. 288 (1868) ..... 7, 13, 14

*Herilla* v. *City of Baltimore*, 337 Md. App. 481, 378 A.2d 162 (1977) ..... 26

*Hunt* v. *Boonville*, 65 Mo. 620, 27 Am. Rep. 299 (1877) ..... 7, 13

*Imbler* v. *Patchman*, 424 U.S. 409 (1975) ..... 7, 11

*Lake Shore Railway Co.* v. *Prentice*, 147 U.S. 101 (1893) ..... 9, 20, 21

*Lauer* v. *YMCA of Honolulu*, 57 Haw. 390, 557 P.2d 1334 (1966) ..... 26

*Luther* v. *Borden*, 7 How. 1 (1849) ..... 16

*McGary* v. *President and Council of Lafayette*, 12 Rob. 674, 43 Am. Dec. 239 (1846) ..... 7, 12

*McMello* v. *John B. Kelly, Inc.*, 238 F.2d 96 (3rd Cir. 1960) ..... 28

*Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978) ..... 10

*Newton* v. *Wilson*, 128 Miss. 726, 91 So. 419 (1922) ..... 26

*Nixon* v. *Oklahoma City, Okla.*, 555 P.2d 1283 (1976) ... 26

Page

*O'Brien* v. *Willys Motors, Inc.*, 385 F.2d 163 (6th Cir. 1967) ..... 28
*Order of Hermits of St. Augustine* v. *County of Philadelphia*, 4 Clark 120, Brightly NP (1847) ..... 7, 12
*Owen* v. *City of Independence*, 100 S.Ct. 1398 (1980) ..... 9, 10, 11, 22, 23, 24
*Pierson* v. *Ray*, 386 U.S. 547 (1967) ..... 7
*Ranells* v. *Cleveland*, 41 Ohio St.2d, 321 N.E.2d 885 (1975) ..... 26
*Russell* v. *Men of Devon*, 2 T.R. 667 (1778) ..... 26
*Scheurer* v. *Rhodes*, 416 U.S. 232 (1974) ..... 7, 11
*State* v. *Sanchez*, 119 Ariz. 64, 579 P.2d 568 (1978) ..... 26
*Tenney* v. *Brandhove*, 341 U.S. 367 (1951) ..... 7
*The Amiable Nancy*, 3 Wheat. 546 (1818) ..... 9, 18
*Whipple* v. *Walpole*, 10 N.H. 130 (1839) ..... 7, 14
*Williams* v. *City of New York*, 508 F.2d 356 (2nd Cir. 1974) ..... 10, 27, 28
*Wilson* v. *City of Wheeling*, 19 W.Va. 323, 42 AR 780 (1882) ..... 26
*Wood* v. *Strickland*, 420 U.S. 308 (1975) ..... 11
*Woodman* v. *Nuttingham*, 49 N.H. 387, 6 Am. Rep. 528 (1870) ..... 7, 14
*Younger* v. *Harris*, 401 U.S. 37 (1971) ..... 9, 17

**Constitutional Provisions**

United States Constitution
Amendment I ..... 2
Amendment XIV ..... 2

**Statutes**

28 U.S.C. § 1331 ..... 3
§ 1343(3) ..... 3
42 U.S.C. § 1983 ..... I, 2, 3, 7, 9, 11, 14
Federal Rules of Civil Procedure, Rule 51 ..... 10

**Miscellaneous**

25 C.J.S. Damages § 123(7) ..... 24
Cong. Globe, 42 Cong. 1st Sess. 795 (1871) ..... 8, 15
Hines, *Municipal Liability for Exemplary Damages*, 15 Cleve.Mar.L.Rev. 304 (1966) ..... 26
70 H.L.Rev. 517, *Exemplary Damages in the Law of Torts* ..... 17
18 McQuillan, Municipal Corporations (3rd. ed.) (1977 Rev. Vol.) § 53.18a ..... 25
46 Va.L.Rev. 1036, *Punitive Damages and Their Possible Application in Automobile Accident Litigation* ..... 17

# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-396

THE CITY OF NEWPORT,
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Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF FOR THE PETITIONERS

### Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 626 F.2d 1060 and appears at Appendix A-1 to A-15 to the Petition for a Writ of Certiorari. The opinion of the United States District Court for the District of Rhode Island on Petitioners' Motion for Judgment N.O.V. and a New Trial is unreported and appears at Appendix B-1 to B-15 to the Petition for a Writ of Certiorari.

## Jurisdiction

The opinion of the United States Court of Appeals for the First Circuit was rendered on June 17, 1980, and that Court's mandate was issued on July 8, 1980. The Petition for a Writ of Certiorari was filed on September 12, 1980 and the Writ was issued on December 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Constitutional and Statutory Provisions Involved

1. First Amendment to the Constitution of the United States.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of spech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. Fourteenth Amendment to the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 42 U.S.C. Section 1983

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## Statement of the Case

The United States District Court for the District of Rhode Island had jurisdiction of this matter by virtue of 28 U.S.C. Secs. 1331 and 1343(3).

On August 22, 1975, the plaintiff, Fact Concerts, Inc. and the City of Newport entered into a contract in consideration for which the City granted to the plaintiff an entertainment license for the purpose of conducting a music concert at Fort Adams, a State owned reservation in the City of Newport, on August 30th and 31st.

The contract provided in paragraph 2 that:

"It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interest of the public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation."

And in paragraph 7 it further provided:

"The Producer agrees to comply with all orders of the Director of Public Safety with reference to fire and police protection and safety including, but not limited to, the following:

(a) Auxiliary generator for lighting;
(b) Firefighters for fire protection and First Aid duties;

(c) Portable firefighting equipment, state area;
(d) Seating to be arranged so that aisles point near exits off the field as well as possible—all chairs to be wired together. Exits and entrances shall be provided as directed;
(e) All seats to be installed and ready for occupancy no later than 3:00 P.M. on August 29, 1975." (J.A., pp. 27-29).

At the time the contract was entered into the program had been advertised in both the New York *Times* and Providence *Journal* as featuring Dave Brubek, Herbie Mann, Ahmad Jamal, Buddy Rich, Miles Davis, Maynard Ferguson, Sarah Vaughan and Stan Getz. (R. I; pp. 10, 17)

On Sunday, August 24th, two days after the Friday that the contract had been signed, an ad appeared indicating that a group named "Blood, Sweat and Tears" had been substituted for Sarah Vaughan who had cancelled her commitment to appear in Newport. (R. I; p. 20).

The next day Nelson Amado, one of the principals in Fact Concerts, received a call that "some problems had been raised" concerning the substitution of Blood, Sweat and Tears on the program. As a result of this call, Mr. Amado requested a meeting of the council and one was called for and held on August 26th. (R. II; pp. 126-7)

The minutes of that meeting indicate that it was called to order at 11:30 A.M.; that all of the defendants were present and that "After a long discussion, pro and con, Mayor Donnelly moved that unless Blood, Sweat and Tears was removed from the bill on Sunday, the license for the contract would be cancelled by the City Council." (J.A. p. 63).

As a result of this meeting representatives of the plaintiffs met and decided "unanimously to abide by their decision to remove Blood, Sweat and Tears from the show and replace them" (R. I; p. 31)

On either Wednesday or Thursday of that same week Amado received a call from the City Solicitor advising him that Blood, Sweat and Tears would be permitted to play if they did not play rock music but rather jazz. (R. II; p. 129)

A second and most critical meeting was held on Friday, August 29th. The principals in Fact Concerts were present with their attorney along with members of the City Council, the City Solicitor, James O'Brien and City Manager Perry. The minutes reveal that the meeting was called to order at 4:28 P.M. and that it began with a discussion of "a possible lawsuit" and what appeared to be the offering of two alternatives to the plaintiffs; that is to say, cancellation of the concert, or the execution of an affidavit that rock music would not be played. (J.A., p. 64)

It is clear from the testimony of all witnesses that no such affidavit was ever executed by the plaintiffs or prepared by the defendants. (R. II; pp. 131, 133-34)

Shortly before the meeting and shortly after 3:00 P.M. on that date City Manager Perry had gone to the site of the concert at the request of the Council to determine whether or not the promoters had complied with paragraph 7 of the contract. He observed that the chairs were not wired together, but rather attached to each other by tape and there were still 500 to 1000 chairs that had not been taped. He was also unable to find the auxiliary generator which had been called for in the contract, although there is some evidence that one had been located outside the walls of Fort Adams. (J.A., p. 64)

According to the minutes he reported this to the Council and after some discussion a motion was made, seconded and approved unanimously to cancel the contract. The meeting was recessed at 5:05 P.M. (J.A., p. 65)

All of the councilmen who testified indicated that they were concerned because of earlier disturbances (in 1960, 1969 and 1971) at so-called rock concerts and that it was this concern that prompted the vote to cancel. (J.A., pp. 34-9, 42-8)

The meeting was reconvened at 6:25 P.M. at which time the attorney for Fact Concerts advised the Council that suit would be instituted and requested a further continuance to consult with his client. That meeting was recessed at 8:55 P.M. and reconvened at 9:27 P.M. at which time the Council was again advised that litigation would result. The meeting was adjourned. (J.A., pp. 65-66)

The next day, Saturday, August 30th, the plaintiffs obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned including the appearance of Blood, Sweat and Tears on Sunday, August 31st. Approximately 6400 people attended the two-day event. (R. III, pp. 134-5, 324)

Thereafter Fact Concerts, Inc. and Marvin Lerman (one of the promoters) brought a five count complaint in the United States District Court for the District of Rhode Island seeking declaratory relief, redress for a violation of their First Amendment rights, and compensatory and punitive damages for various pendant contract claims. (J.A., pp. 8-13)

At trial the complaint was reduced to two counts, the first a Section 1983 claim and the second a claim for interference with contractual relationships.

The jury answered interrogatories finding all defendants liable on both counts and awarding $72,000.00 compensatory damages and punitive damages in the total amount of $275,000.00 of which $200,000.00 was assessed against the City of Newport and $75,000 against the councilmen.

A Motion for Judgment N.O.V. and a New Trial was filed and after hearing thereon the trial justice ordered a remittitur of $125,000.00 of the punitive damage award against Newport and sustained the verdicts in all other respects. (App. B to Pet. for Cert.)

The United States Court of Appeals for the First Circuit affirmed. (App. A to Pet. for Cert.)

## Summary of the Argument

The arguments against permitting an award of punitive damages against a municipality fall generally into two categories—historic and legal.

### I.

### HISTORIC

This Court has repeatedly held that traditional immunities deeply rooted in public policy have remained undisturbed by the enactment of Section 1983. *Imbler* v. *Patchman*, 424 U.S. 409 (1975) (state prosecutor); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (state judges); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (qualified immunity for state executives); and *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (state legislators).

Prior to the enactment of Section 1983 by the 42nd Congress in 1871, no jurisdiction which had considered the question had allowed such an award of punitive damages to stand. This was not a new or novel approach in 1871; it was a settled principle of the common law.

*City Council of Montgomery* v. *Gilmer & Taylor*, 33 Ala. 116, 70 Am. Dec. 562 (1858); *Chicago* v. *Langlass*, 52 Ill. 256, 4 Am. Rep. 603 (1869); *McGary* v. *President and Council of Lafayette*, 12 Rob. 674, 43 Am. Dec. 239 (1846); *Hunt* v. *Boonville*, 65 Mo. 620, 27 Am. Rep. 299 (1877); *Order of Hermits of St. Augustine* v. *County of Philadelphia*, 4 Clark 120, Brightly NP 116 (1847); *Herfurth* v. *Corporation of Washington*, 6 Dist. Col. 288 (1868); *Chicago* v. *Martini*, 49 Ill. 241, 95 Am. Dec. 590 (1868); Cf. *Whipple* v. *Walpole*, 10 N.H. 130 (1839); *Woodman* v. *Nuttingham*, 49 N.H. 387, 6 Am. Rep. 528 (1870) (overruling *Whipple*, supra).

In each of these cases the reviewing court recognized the societal value of compensating the injured plaintiff for his actual loss but shrank from the notion that a punitive award would ever be available.

Some members of the 42nd Congress showed great reluctance to impose any form of liability upon a municipality and it cannot be argued that the whole Congress intended to impose a new and potentially ruinous form of liability by way of punitive damages. Commenting in the debate on the Sherman amendment (a precursor of Section 1983) Representative Blair observed:

> "There are certain rights and duties that belong to the states... there are certain powers that inhere in the state government. They create these municipalities, they say what their power shall be and what their obligations shall be. If the Government of the United States can step in and add to these obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, where will its power stop, in what obligations might it not lay upon a municipality..."
>
> Representative Blair
> Cong. Globe, 42nd Cong, 1st Sess. 795 (1871)

Lastly an award of punitive damages represents an unwarranted intrusion by the federal government into affairs of a municipality. The Trial Justice noted (in passing upon the motion for judgment N.O.V. and a new trial) that

> "In some circumstances, however, a punitive award against a municipality may serve beneficial purposes. The payment of such an award necessarily serves to focus taxpayer and voter attention upon the malicious acts of the municipal government. This attention, in turn, well may have a beneficial effect in the next election."
>
> Appendix B to the Petition for Certiorari, p. 9.

This Court should display the same reluctance to interfere directly in municipal elections as it did with state judicial proceedings in *Younger* v. *Harris*, 401 U.S. 37 (1971).

## II.

## LEGAL

The propriety of an award of punitive damages against a municipality in a Section 1983 case is clearly governed by federal common law. And since at least 1818 federal common law has regarded the function of a punitive damage award as punishment of the offender and not as compensation to the victim or vindication of society. *The Amiable Nancy*, 3 Wheat. 546 (1818), *Lake Shore Railway Co.* v. *Prentice*, 147 U.S. 101 (1893).

The burden of any punitive damage award ultimately falls upon the taxpaying resident of the municipality. But is he the offender? If he is, it is by reason of his residence in the community and nothing more. And escaping the punishment are all non-taxpaying residents except to the extent that they are deprived of municipal services that would otherwise be provided by the tax dollars that are diverted to pay the award of punitive damages.

Should the taxpayer bear this additional burden without limiting his liability to "only the costs of injury inflicted" by the execution of municipal policy. *Owen* v. *City of Independence*, 100 S.Ct. 1398 (1980) at p. 1419.

If the "fairness" test suggested in *Owen* (supra) is applied to that question, the inevitable answer must be "no".

In a day when municipal budgets are strained to the breaking point and at least two of the country's major cities have teetered on the brink of bankruptcy, it makes no sense to impose a further burden on a local treasury for the dubious purpose of punishing someone who probably is not at all guilty.

While it is clear that prior to 1871 virtually every court of the United States that had considered the question had held that punitive awards are not recoverable against a municipality (supra, p. 7). It is equally clear that post 1871 courts have displayed the same unanimity. Indeed, few principles seem so deeply rooted in the common law of this nation.

III.

Lastly, it is undisputed that Trial Counsel failed to preserve objections to the charge on punitive damages as required by Rule 51.

Nonetheless defendants urge that this lapse may and should be rectified by application of the "plain error" rule. *Williams* v. *City of New York*, 508 F.2d 356 (2nd Cir. 1974). The overwhelming authority, both historic and legal, mitigating against such an award and obvious miscarriage of justice which will result if it stands cry out for a thorough review of the issue.

**Argument**

The arguments against permitting awards of punitive damages against municipalities in Section 1983 cases fall generally into two categories—historic and legal. In *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978) and later in *Owen* v. *City of Independence, Mo.*, 100 S.Ct. 1398 (1980) this Court examined the legislative history of Section 1983 applying (in *Owen*) the following test:

> "However, notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so pro-

> vided had it wished to abolish the doctrine.' Pierson v. Ray, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967). Thus in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), after tracing the development of an absolute legislative privilege from its source in 16th century England to its inclusion in the Federal and State Constitutions, we concluded that Congress 'would (not) impinge on a tradition so well grounded in history and reason by covert inclusion in the general language' of § 1983. Id., at 376, 71 S.Ct. at 788."

The defendants urge that in 1871 the doctrine of municipal immunity from awards of exemplary damages was firmly rooted in our common law and the 42nd Congress could not have been unaware of it.

The defendants urge further that the legal policy reasoning behind such a doctrine is as strong today as it was then and Congress could not possibly have intended to alter it.

## I. The Historic Background of the Immunity

1. 42 U.S.C. 1983 is absolute and unqualified on its face. The statute does not specifically provide for any immunities or defenses which a municipality may or can assert. In numerous cases, however, this court has created defenses for recognized immunities. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In *Owen* v. *City of Independence, supra*, this court held:

> "Where the immunity claimed by the defendant was well established in common law at the time, Section 1983 was enacted, and where the rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity."

at p. 1409

By 1871, it was virtually unanimously established that exemplary or punitive damages were not recoverable against a municipal corporation. One of he earliest American cases on point is *Order of Hermits of St. Augustine* v. *County of Philadelphia*, 4 Clark 120, Brightly N.P. 116 (1847, Pa.). Pennsylvania had enacted an ordinance, very similar to the Sherman Amendment to the First Civil Rights Act, which allowed individuals to sue the county for the destruction of property situated therein by mob violence. The Court of Pennsylvania held that while the action, if it were against the rioters, would have permitted the assessment of exemplary damages, such damages were not recoverable against the county itself. In *McGary* v. *The City of Lafayette*, 12 Robinson 674, 43 Am. Dec. 239 (1846), the officers of Lafayette had, in violation of an injunction, willfully and intentionally ordered the demolition of the plaintiff's building. The court held at Page 677,

> "Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case, admitting that she was entitled to recover any from the defendants, being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification."

The majority of courts which, prior to 1871, considered the question of the propriety of an award of punitive damages against a municipality, refused to recognize such awards with little or no comment. The case of *Chicago* v. *Langlass*, 52 Ill. 256, 259 (1869) is typical. The court there held simply,

> "But in fixing the compensation the jury have no right to give vindictive or punitive damages, against a municipal corporation. Against such a body there should only be compensatory, and not by way of punishment."

In *City Council of Montgomery* v. *Gilmer and Taylor*, 33 Ala. 116, 70 Am. Dec. 562 (1858), the Supreme Court of Alabama overturned a verdict awarding punitive damages against the City Council of Montgomery again without extended comment. The court there held:

> "The corporation cannot, upon any principle known to us, be responsible for the malice of its officers towards the plaintiffs."

p. 132

The various jurisdictions at or about the time of the Civil Rights Act of 1871 refused to award exemplary damages against a municipality even in the face of a statute which apparently expressly provided for such an award. In an 1877 case, *Hunt* v. *Boonville*, 65 Missouri 620, 27 Am. Rep. 299 (1877), the court held that a municipal corporation was not liable for treble damages for a trespass to the plaintiff's land and the removal therefrom of the plaintiff's stone, notwithstanding a statute which specifically provided for treble damages against any person wrongfully quarrying or carrying away any stones or ore. The Supreme Court of Missouri held that a municipal corporation could not do a criminal act or a malicious and willful wrong and thus would not come within the provisions of the statute as to exemplary damages. In *Herfurth* v. *Corporation of Washington*, 6 D.C. 288, 293 (1868), the courts of the District of Columbia refused to award punitive damages against the Corporation of Washington. The court held:

> "The whole doctrine of exemplary damages as applied to an agent has no solid foundation. Such a case as this is

> not a case for exemplary damages. The Corporation of Washington is an agent of the people. The people are bound for their negligence, but they are not insurers of every wayfarer on the streets."

Only one case, *Whipple* v. *Walpole*, 10 N.H. 130 (1839) admitted even the possibility of a punitive award against a municipality. The court held that were a municipality guilty of gross negligence, exemplary damages might be awarded against it. But one year prior to the enactment of the Civil Rights Act of 1871, the Supreme Court of New Hampshire in *Woodman* v. *Nottingham*, 49 N.H. 387, 394 6 Am. Rep. 526 (1870), the court expressly overruled *Whipple*, holding:

> "Nor do we believe it to be necessary or proper in actions generally against towns under our statute, to instruct the jury to allow vindictive damages eo nomine; for it cannot be presumed that towns in cases of this kind are influenced by malice when accidents of this nature occur; and if the circumstances of any case show even gross negligence, it appears to us to be enough, for the jury in making up their verdict, to give all the actual damages the plaintiff has suffered, and no more; nor do we think that the legislature ever contemplated anything more than a full indemnity for the injury received to the person or property, by their statute regulating the subject."

2. That punitive damages might be assessed against a municipal corporation was wholly foreign to the common law as it existed in 1871. Nor does an examination of the debate surrounding passage of the Civil Rights Act of 1871 support any inference that the legislators intended such an award should be proper under Section 1983. The debate evidenced great concern over the destructive effects of imposing a novel liability upon a municipality. Representative Blairs' statement in that regard, is particularly in point:

"There are certain rights and duties that belong to the states... there are certain powers that inhere in the state government. They create these municipalities, they say what their power shall be and what their obligations shall be. If the Government of the United States can step in and add to these obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, where will its power stop, in what obligations might it not lay upon a municipality...

"Not only the other day, the Supreme Court... decided that there is no power in the Government of the United States, under its authority to tax, to tax the salary of a state officer. Why? Simply because the power to tax involves the power to destroy, and it was not the intent to give the Government of the United States power to destroy the government of the states in any respect." Globe supra.

There is no basis to assume that the legislators in 1871 either wished or intended to allow assessments of punitive damages against municipalities. There is every reason to assume otherwise. In this case, it is particularly easy to divine the intent of the dead. The same policies which uniformly compelled the courts in the nineteenth century to deny punitive awards against municipalities apply equally as well today. In these days of municipal fiscal crises, the necessity of providing immunity against punitive awards is, if anything, even more urgent.

3. The trial justice found that an award of punitive damages against a municipality might serve beneficial purposes:

"The payment of such an award necessarily serves to focus taxpayer and voter attention upon the malicious

> acts of the municipal government. This attention, in turn, well may have a beneficial effect in the next election.' (Appendix B to the Pet. for Cert. p. 9)

That the award of punitive damages will have an effect upon the next election is unquestionable. But that effect will not be salutary.

Clearly, the members of Newport's City Council and its Mayor did not foresee that their tenures in office would end in financial ruin. The award of punitive damages against the individual office holders must have a chilling effect upon those seeking to serve the municipality in a representative capacity. Even if the punitive award did not deter members of the council from running for office, they would certainly not find favor with the citizens of the City who also had suffered a financial loss as a result of the award.

The punitive award against the City is a direct intervention by the Federal judiciary into Newport's government. It is a sanction upon those duly elected representatives of Newport who have in the Court's opinion governed badly. It is a sanction upon the citizens of Newport who have in the Court's opinion allowed themselves to be ill-governed. As early as 1849, in *Luther* v. *Borden*, 7 How. 1 (1849) the Supreme Court of the United States refused to determine *sub judice* which of two opposing factions was the true government of the State of Rhode Island. No Court may maintain its neutrality while actively engaged in partisan politics. The punitive award in the present case, as both the parties and the trial justice recognized, expresses the Courts' disapproval of Newport's elected representatives. The punitive award endorses any political faction in opposition to the members of Newport's government as it was composed in the summer of 1975.

This direct involvement in the affairs of local politics is an intolerable abuse of the federal judicial power. The federal

judiciary has long labored to assure every citizen of the United States a truly representative government. Is the Court now to punish those citizens who have in its opinion not chosen well? In *Younger* v. *Harris*, 401 U.S. 37 (1971), the Supreme Court of the United States strongly reaffirmed its belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. While this Court is bound to vindicate federal rights, that vindication must be accomplished in ways that will not unduly interfere with the legitimate activities of the States. In *Younger* v. *Harris*, supra, the Supreme Court declared its reluctance to involve itself in State judicial proceedings. This Court must be even more reluctant to involve itself in the composition of an elected city council. This Court must hold as a matter of federal common law that a municipality immune from awards of punitive damages.

## II. The Legal Rationale of the Immunity

1. In the jurisdictions where punitive or exemplary damages are awarded, their assessment is rationalized on one of three theories—compensation for the victim, vindication of society or punishment of the offender as a deterrent to others.[1] In the United States only three have adopted the compensation approach and all others utilize one or both of the latter two theories.[2] To the extent that there is a federal common law,[3] it is clear that it embraces the punishment rationale.

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[1] 46 Va. L. Rev. 1036, *Punitive Damages and their Possible Application in Automobile Accident Litigation.*

[2] 70 H. L. Rev. 517, *Exemplary Damages in the Law of Torts* at pages 520-2.

[3] *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir. 1968), *cert. denied*, 393 U.S. 940, 89 S.Ct. 299.

As early as 1818 this Court determined that the function of punitive or exemplary damages awarded in federal cases was to punish offenders. Writing for a unanimous Court in *The Amiable Nancy*, 3 Wheat. 546, Mr. Justice Story, reforming a decree of the Circuit Court for the Southern District of New York and commenting on the propriety of an award of punitive damages, stated:

> "And if this were a suit against the original wrong-doers, it might be proper to go yet further, and visit upon them in the shape of exemplary damages, the proper *punishment* which belongs to such lawless misconduct.
>
> . . .
>
> "While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government, by burdening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and *intended to punish* offenders." (emphasis supplied) p. 558, 9

In 1885, Mr. Justice Matthews reiterated this view in *Barry v. Edmunds*, 116 U.S. 550, stating:

> "The cause of action stated in the declaration is a wilful and malicious trespass, in seizing and taking personal property, with circumstances of aggravation and averments of special damage. The trespass is alleged to have been committed by the defendant, colore officii, under the pretended authority of void process, in open defiance of known law, accompanied by conduct intended to bring the plaintiff into public contempt and odium, and amounting to oppression in office.

"It is quite clear that the amount of the taxes alleged to be delinquent, for non-payment of which the seizure was made, is immaterial. It is equally clear that the plaintiff is not limited in his recovery to the mere value of the property taken. That would not necessarily cover his actual, direct, and immediate pecuniary loss. In addition, according to the settled law of this court, he might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions. 'It is a well established principle of the common law,' said Mr. Justice Grier in Day v. Woodworth, 13 How. 362, 371, 'that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.' We are aware that the propriety of this doctrine has been questioned by some writers; but, if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument... In actions of trespass, where the injury has been wanton and malicious or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of *punishment* or example, which has sometimes been called 'smart money'. This has always been left to the discretion of the jury, as the degree of the punishment to be thus inflicted must depend on the peculiar circumstances of each case." (emphasis supplied) at p. 562.

And in 1893, Mr. Justice Gray traced the history of such awards thusly:

"The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liablity of a railroad corporation as a common carrier of goods or passengers—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment—*is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States.* Railroad Co. v. Lockwood, 17 Wall. 357, 368; Liverpool Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 443; Myrick v. Michigan Central Railroad, 107 U.S. 102, 109; Hough v. Railway Co., 100 U.S. 213, 226.

"The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the King's messengers for trespass and imprisonment under general warrants of the Secretary of State, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover 'exemplary damages,' the Chief Justice instructed the jury as follows: 'I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, *but likewise as a punishment to the guilty*, to deter from any such proceeding for the future, and as a proof of the

detestation of the jury to the action itself.' Wilkes v. Wood, Lofft, 1, 18, 19; S.C. 19 Howell's State Trials, 1153, 1167. See also Huckle v. Money, 2 Wilson, 205, 207; S.C., Saver on Damages, 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

"In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559; Day v. Woodworth, 12 How. 363, 371; Philadelphia &c. Railroad v. Quigley, 21 How. 202, 213, 214; Milwaukee & St. Paul Railway v. Arms, 91 U.S. 489, 493, 495; Missouri Pacific Railway v. Humes, 115 U.S. 512, 521; Barry v. Edmunds, 116 U.S. 550, 562, 563; Denver & Rio Grande Railway v. Harris, 122 U.S. 597, 609, 610; Minneapolis & S. Louis Railway v. Beckwith, 129 U.S. 26, 36.

"Exemplary or punitive damages, being awarded, not by way of compensation to the suffered, *but by way of punishment of the offender*, and as a warning to others, can be awarded only against one who has participated in the offense." (emphasis supplied)

*Lake Shore Railway Co.* v. *Prentice*, 147 U.S. 101 (1893) at pp. 106, 7

It is clear that the burden of a punitive damage assessment against a municipality will fall upon the taxpayers and no one else. In short they are punished. But are they the offenders?

If they are divided into categories, there will be taxpayers who resided in the city when the wrong was done and who voted for the administration, taxpayers who resided in the city when the wrong was done and who voted against the administration, taxpayers who resided in the city when the wrong was done and who did not vote, taxpayers who resided in the city when the wrong was done and who were ineligible to vote, corporate taxpayers, non-resident taxpayers and finally taxpayers who did not reside in the city when the wrong was done but have moved to the city prior to the assessment of damages. Of these groups only the first could conceivably be classified as guilty and then only remotely. Escaping altogether are the non-taxpaying residents of the city and those taxpayers who were residents at the time the wrong was committed and who moved before the assessment of damages. The inequity of such a scheme of punishment is obvious.

In the *Owen* case (supra) this Court adopted what may be described as a "fairness" test in determining where the burden of compensatory damages should fall in a case against a municipality when it stated:

> "It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in Thayer v. Boston, supra—'that the city, in its corporate capacity, should be liable to make good the damages sustained by an (unlucky) individual, in consequence of the acts, thus done.' 19 Pick. at 516. After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus,

even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. See generally 3 K. Davis, Administrative Law Treatise § 25.17 (1958 and Supp. 1970); Prosser § 131, at 978; Michelman, Property, Utility, and Fairness: Some Thoughts on the Ethical Foundations of 'Just Compensation' Law, 80 Harv. L. Rev. 1165 (1967) at p. 1417.

. . .

"(1c) In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

"We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a

> whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' Monell v. New York City Dept. of Social Services, 436 U.S. at 694, 56 L.Ed.2d 611, 98 S.Ct. 2018." (at pp. 1418-9)

While fairness shifts the burden of injury from the innocent plaintiff to taxpayers as a whole insofar as compensation is concerned, it certainly does not require that the innocent taxpayer bear the burden of what is literally a windfall to the plaintiff—punitive damages.

Conceding that there is an obvious societal interest in making the injured whole, there is certainly no justifiable reason to go further than that when public funds are involved.

This is particularly true when it is evident that the judicial interest in punishing the wrongdoer is accomplished slightly if at all and no actor is deterred from a repetition of his wrong except to the extent that he is a taxpayer. If vindication of society plays a role in the assessment of punitive damages, the opposite effect is felt here—it is society that is punished.

Lastly, permitting the court to award exemplary damages against a municipality presents a true legal dilemma in light of this Court's holding in *Owen* (supra). Good faith has always been a defense to a claim for punitive damages. 25 C.J.S. *Damages* § 123(7). Yet that defense has been found to be unavailable to a municipality in a Section 1983 case. (*Owen*, supra).

It is suggested that some of the same reasoning that prompted this court to bar awards of punitive damages in union unfair representation cases is applicable here. In *Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), this Court measured the potential depletion of a union treasury and the concomitant disruption of its business against the potential deterrent effect of the impositions of punitive damages thusly:

"(9) This limitation on union liability thus reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds. To permit punitive damages, which, by definition, provide monetary relief 'in excess of . . . actual loss,' Scott v. Donald, 165 U.S. 58, 86, 41 L.Ed. 632, 17 S.Ct. 265 (1897), could undermine this careful accommodation. Because juries are afforded broad discretion both as to the imposition and amount of punitive damages, see Gertz v. Robert Welch, Inc. supra, at 349-350, 41 L.Ed.2d 789, 94 S.Ct. 2997; Prosser, § 2, pp. 13-14, the impact of these windfall recoveries is unpredictable and potentially substantial. Cf. Hall v. Cole, 412 U.S. 1, 9 n.13, 36 L.Ed.2d 702, 93 S.Ct. 1943 (1973). Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have. Cf. Automobile Workers v. Russell, 356 U.S. 634, 658, 2 L.Ed.2d 1030, 78 S.Ct. 932 (1958) (Warren, C.J., dissenting)."

(footnote omitted) at pp. 50 and 51.

This reasoning is as applicable to an exemplary award against a municipality as it is to an award against a union.

2. While the question of the propriety of an award of punitive damages in a section 1983 case is clearly governed by federal law,[4] it is of significance to note that an overwhelming majority of post 1871 jurisdictions have held that municipalities are not liable for exemplary damages unless expressly authorized by statute.[5]

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[4] *Batista* v. *Weir*, 340 F.2d 74 (3rd Cir. 1965); Antieau, *Federal Civil Rights Acts* § 212 at p. 355.

[5] 18 McQuillan, *Municipal Corporations* (3rd Ed.) (1977 Rev. Vol.) § 53.18a, p. 161-2.

Some representative cases are *State* v. *Sanchez*, 119 Ariz. 64, 579 P.2d 568 (1978); *Charles E. Smith, Jr.* v. *District of Columbia*, D.C. App., 336 A.2d 831 (1975); *Fisher* v. *City of Miami*, 172 So.2d 455 (Fla. 1965); *Fulton County* v. *Baranan*, 240 Ga. 837, 242 S.E.2d 617 (1978); *Lauer* v. *YMCA of Honolulu*, 57 Haw. 390, 557 P.2d 1334 (1966); *City of Gary* v. *Falcone*, 169 Ind. App. 295, 348 N.E.2d 41 (1976); *Foss* v. *Maine Tpke. Auth.*, Me., 309 A.2d 339 (1973); *Herilla* v. *City of Baltimore*, 337 Md. App. 481, 378 A.2d 162 (1977); *Des Forge* v. *West St. Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950); *Newton* v. *Wilson*, 128 Miss. 726, 91 So. 419 (1922); *Chappell* v. *City of Springfield, Mo.*, 423 S.W.2d 810 (1968); *Ranells* v. *Cleveland*, 41 Ohio St.2d 1, 321 N.E.2d 885 (1975); *Nixon* v. *Oklahoma City, Okla.*, 555 P.2d 1283 (1976); *Cole* v. *City of Houston*, 442 S.W.2d 445 (Tex. Civ. App. 1969); and *Wilson* v. *City of Wheeling*, 19 W.Va. 323, 42 AR 780 (1882).

Indeed there are probably few legal principles upon which the courts of the various states have been in such accord.

As one writer has put it:

> "Although the law is not altogether free from doubt on the subject of municipal liability for exemplary damages, it is a settled principle that exemplary damages may not be recovered against a municipal corporation, nor a state, in the absence of statutory authority." (footnotes omitted)[6]

This unanimity is undoubtedly a recognition of a rather universal common law rule which probably had its genesis in *Russell* v. *Men of Devon*, 2 T.R. 667 (1778) and one which the drafters of Section 1983 must have been aware.

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[6] Hines, *Municipal Liability for Exemplary Damages*, 15 Cleve. Mar. L. Rev. 304 (1966).

## III. The Failure To Make Objections to the Trial Justice's Charge on Punitive Damages

1. Defendants concede (as they must) that trial counsel failed to make timely objection to the District Court's charge on punitive damages in accordance with Rule 51. This failure was recognized by both the District Court (Appendix to Petition for Certiorari pp. B-2, 3) and the Court of Appeals (Appendix to Petition for Certiorari p. A-14).

In light of the almost universal rule that punitive damages are not recoverable against a municipality, it may fairly be said that such a charge constituted "plain error" and the fact that innocent taxpayers will bear the burden of such award certainly qualifies as a "miscarriage of justice".

In this respect the case is remarkably similar, if not identical to the case of *Williams* v. *City of New York*, 508 F.2d 356, 362 (2nd Cir. 1974) in which the Appellate Court stated:

> "(9,10) Review of the punitive damage award, however, faces a procedural hurdle. The jury's award of punitive damages to Williams rested upon an erroneous statement of the law by the trial court. For the court in its instructions to the jury failed to indicate the need to find the City, rather than its agents alone, was culpable of any wrongdoing. This was error in the charge. But reversal on this basis normally requires timely objection to the allegedly defective instruction in the district court, Fed.R.Civ.P. 51, and the appellant city neglected to object to the punitive damages charge.
>
> (11,12) Under applicable standards, this court may take cognizance of the court's error, though timely objection was not made, if it is "plain and may result in a miscarriage of justice." McNamara v. Dionne, 298 F.2d 352, 355 (2d Cir. 1962). Relief under this plain error doctrine may not be granted casually, Troupe v. Chicago,

> D. & G. Bay Transit Co., 234 F.2d 253, 259 (2d Cir. 1956). However, consideration of error not properly raised under the rule is warranted in exceptional cases in the interests of justice, Ferrara v. Sheraton McAlpin Corp., 311 F.2d 294 (2d Cir. 1962); cf. Johnson v. United States, 318 U.S. 189, 200, 63 S.Ct. 549, 87 L.Ed. 704 (1943); and the demonstrable deviation of the court's instruction here from the appropriate standard, the serious harm suffered by the defendant as a result of this error, and the remediability of this error without a new trial below, combine to justify overlooking counsel's failure timely to object in this instance. The award of punitive damages must be reversed." (footnote omitted)

See also *Fulton County* v. *Baranan* (supra).

Here the *Williams* test is met. The plaintiffs will be compensated for their actual loss. The error can be remedied without recourse to a new trial. And a clear miscarriage of justice will be corrected. See also *Ferrara* v. *Sheraton McAlpin Corp.*, 311 F.2d 294 (2d Cir. 1962); *McMello* v. *John B. Kelly, Inc.*, 238 F.2d 96 (3rd Cir. 1960) and *O'Brien* v. *Willys Motors Inc.*, 385 F.2d 163 (6th Cir. 1967). Each of these latter cases involved private litigation and a charge to the jury that was less than accurate on a fundamental principle of law. And in each the reviewing court found that the interest in correcting a miscarriage of justice outweighed rigid adherence to a procedural rule.

How much more compelling is the argument here where the burden of such miscarriage will fall upon the innocent taxpayer rather than upon the acting wrongdoer.

## Conclusion

That portion of the judgment below relating to punitive damages should be reversed and the case remanded to the District Court.

Respectfully submitted,

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No. 80-396

# In the Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## BRIEF FOR THE RESPONDENTS

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## I

### Questions Presented

1. Should this Court reverse an award of punitive damages against a municipality in a section 1983 action when the municipality failed to object to the charge to the jury on punitive damages?

2. If the question is reached, is a municipality liable for punitive damages in a section 1983 action?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | I |
| Statement of the Facts | 2 |
| Travel of the Case | 6 |
| Argument | |
| I. The Petitioners Failed to Object to the Charge to the Jury on Punitive Damages and Hence Cannot Now Argue That Punitive Damages Cannot Be Levied Against a Municipality in a Section 1983 Action | 7 |
| II. The Trial Judge Was Correct in Instructiong the Jury That Punitive Damages Could Be Levied Against a Municipality in a Section 1983 Action | 9 |
| Conclusion | 19 |


### Table of Citations

**Cases**


*Bradshaw* v. *Zoological Society*, 569 F.2d 1066 (9th Cir. 1978) ..... 12

*Burnaman* v. *Bay City Independent School District*, 445 F. Supp. 927 (S.D. Tex. 1978) ..... 12

*Carey* v. *Piphus*, 435 U.S. 247 (1978) ..... 14, 15

*Carlson* v. *Green*, 100 S.Ct. 1468 (1980) ..... 7, 14

*Carter* v. *Carlson*, 447 F.2d 358 (D.C. Cir. 1971) ..... 17

*Cook* v. *City of Miami*, 464 F. Supp. 737 (S.D. Fla. 1979) 12

*Fact Concerts, Inc.* v. *City of Newport*, No. 76-0071 (D. R.I. July 2, 1979) ..... 11

*Ferrara* v. *Sheraton McAlpin Corp.*, 311 F.2d 294 (2d Cir. 1962) ..... 8

*Howell* v. *Cataldi*, 464 F.2d 272 (3rd Cir. 1972) ..... 17


PREVIOUS PAGE WAS BLANK

Page

*Imbler* v. *Pachtman*, 424 U.S. 409 (1976) ..... 10, 15, 16
*McNello* v. *John B. Kelly, Inc.*, 283 F.2d 96 (3d Cir. 1960) ..... 8
*Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) ..... 7, 14, 15, 17
*Monroe* v. *Pape*, 365 U.S. 167 (1961) ..... 10, 15, 17
*Morris* v. *Travisono*, 528 F.2d 856 (1st Cir. 1976) ..... 7
*North American Cold Storage Co.* v. *County of Cook*, 468 F. Supp. 424 (N.D. Ill. 1979) ..... 12
*O'Brien* v. *Willys Motors, Inc.*, 385 F.2d 163 (6th Cir. 1967) ..... 8
*O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) ..... 15
*Owen* v. *City of Independence*, 100 S.Ct. 1398 (1980) .. 9, 13, 14, 15, 16
*Pierson* v. *Ray*, 386 U.S. 547 (1967) ..... 15
*Procunier* v. *Navarette*, 434 U.S. 555 (1978) ..... 15
*Ray* v. *City of Edmond*, No. 80-856-E (W.D. Okla. Nov. 26, 1980), *appeal docketed*, No. 81-1155 (10th Cir. Feb. 11, 1981) ..... 12
*Scheuer* v. *Rhodes*, 416 U.S 232 (1974) ..... 15, 17
*Simineo* v. *School District No. 16*, 594 F.2d 1353 (10th Cir. 1979) ..... 11
*Tenney* v. *Brandhove*, 341 U.S. 367 (1951) ..... 15
*Williams* v. *City of New York*, 508 F.2d 356 (2d Cir. 1974) ..... 8
*Wood* v. *Strickland*, 420 U.S. 308 (1975) ..... 15, 17

**Constitutional Provisions**

United States Constitution
Amendment I ..... 6
Amendment XIV ..... 6

**Statutes**

28 U.S.C. §1331 (1976) ..... 6
§1343(3) (1976) ..... 6
42 U.S.C. §1983 (1976) ... I, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19
Federal Rule of Civil Procedure 51 ..... 2, 7

**Miscellaneous**

Page

Cong. Globe, 42nd Cong., 1st Sess. 795 (1871) (statement of Rep. Blair) ..... 14

Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871) (statement of Rep. Shellabarger) ..... 18

Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979) ..... 13

*The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 77 (1980) ..... 9, 16

Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 Harv. L. Rev. 966 (1980) ..... 10, 17, 18

Note, *Developments in the Law — Section 1983 and Federalism*, 90 Harv. L. Rev. 1133 (1977) ..... 13

Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5 (1974) ..... 10, 18

Radin, *The Jurisdiction of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989 (1978) ..... 10

Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. Cal. L. Rev. 1322 (1976) ..... 10, 18

# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-396

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## BRIEF FOR THE RESPONDENTS

The respondents in the above-entitled matter submit that the decision of the United States Court of Appeals for the First Circuit should be affirmed. The respondents concur in the petitioners' statements under the headings "Decisions Below"

and "Jurisdiction." The respondents concur in the petitioners' statement under the heading "Constitutional and Statutory Provisions Involved" except that the following should also have been included:

> 4. Federal Rule of Civil Procedure 51
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

## Statement of the Facts

In the early summer of 1975, respondent Marvin Lerman and respondent Fact Concerts, Inc., represented by its president, Frank Amado, discussed holding a two-day jazz concert in the City of Newport, Rhode Island. Amado had previously obtained a lease from the Rhode Island Department of Natural Resources for three days' use of a site in Newport known as Fort Adams. Amado obtained a license from the City Council of Newport and successfully staged a one-day concert featuring Arthur Fiedler. Amado also obtained a license from the City Council for the two-day jazz concert, to be held at Fort Adams on August 2nd and 3rd. Subsequently, the respondents successfully sought a substitution of August 30th and 31st from the City Council. The new license was granted through a contract

dated August 22, which the City Council duly authorized by vote. The contract granted the City no control over the choice of performers, nor did it designate the type of music that would be played. It referred only to a "music concert." The City retained the right to cancel only "if the interests of public safety demand."

The respondents began to book top jazz acts during the summer. Since anticipated participant Sarah Vaughan was unavailable, the respondents substituted a group called Blood, Sweat and Tears. This choice triggered the events at the heart of this case. The respondents considered Blood, Sweat and Tears a jazz act equivalent in stature to Sarah Vaughan. The group had appeared in Carnegie Hall and at major jazz festivals and had represented the United States on jazz tours sponsored by the State Department. The group had appeared at a 1969 Newport Jazz Festival without incident. The plaintiffs advertised the jazz concert, announcing the addition of Blood, Sweat and Tears. One such advertisement appeared in the *New York Times* on Sunday, August 24.

The next day Amado spoke with the Mayor of Newport, Humphrey Donnelly, who urged the cancellation of the appearance of Blood, Sweat and Tears on the ground that he did not want any rock bands appearing in Newport. On Tuesday, Fact Concerts officials attended a special meeting of the City Council. They were told that Blood, Sweat and Tears would have to be removed from the program or the license would be revoked. Mayor Donnelly said that Blood, Sweat and Tears would attract a long-haired element that the City did not want. A Fact Concerts spokesman explained that Blood, Sweat and Tears was a jazz group, but this information was rejected. The Council then voted unanimously that unless Blood, Sweat and Tears was removed from the program, the license for the concert would be revoked. Neither at the time of this decision nor subsequently did Mayor Donnelly or any member of the City Council undertake any investigation of the type of music played by Blood, Sweat and Tears. The Council's action generated

negative publicity and uncertainty among potential concert-goers, devastating ticket sales. Newspaper stories indicated that Blood, Sweat and Tears intended to sue the City for damage to their reputation.

Then, on Thursday, Amado received a call from Newport City Solicitor James O'Brien informing him that the City Council had changed its mind and would let Blood, Sweat and Tears play on the program if they did not play rock music. This change of heart occurred because City Solicitor O'Brien had informed Mayor Donnelly and some or all of the councilmen that they did not have the right to pass judgment on the list of performers and that they would be subject to suit if they did. Fact Concerts agreed to send representatives to another special meeting on Friday.

That meeting began at 4:28 p.m. on August 29. Mayor Donnelly said that the Council could either accept the City Solicitor's opinion and obtain an affidavit from Amado that rock music would not be played or cancel the concert entirely. No affidavit was ever presented to Amado or anyone else from Fact Concerts, however, nor was anyone from Fact Concerts ever asked to draw up any kind of affidavit.

City Manager William Perry reported that he had visited the concert site at the direction of the Council shortly after 3:00 p.m., the set-up deadline specified in the contract. He said that he had been unable to observe the auxiliary generator required by the contract and that the wiring together of the seats required by the contract had been in progress but had not been completed by the 3:00 deadline. He added that the chairs were being bound together with tape rather than with wire.

City Manager Perry reported noncompliance with the contract despite the fact that only 500 of the 7,000 chairs were not bound together as of 3:00 p.m., that all of the chairs were bound within fifteen minutes to half an hour after the deadline, and that Rhode Island Director of Natural Resources Dennis Murphy had told him at the site that his objections were frivolous. Also, the professional tape being used to bind the

chairs together was safer and stronger than wire. Finally, an auxiliary generator had been rented from the Newport Fire Department and installed, but the City Manager had apparently overlooked it.

After City Manager Perry's report, Mayor Donnelly stated that if Fact Concerts was in violation of the contract, the Council should cancel it and give Amado the opportunity to enter into a new contract. After discussion, a motion to cancel the contract was adopted unanimously.

The Council then offered Fact Concerts another contract which would have allowed the concert to go on, but without Blood, Sweat and Tears. This offer was made despite the supposed problems with the chairs and the generator. A recess was taken, and when the meeting reconvened at 8:40 p.m., Fact Concerts' attorney informed the Council that suit would be instituted if Fact Concerts was not allowed to put on the concert as planned. Mayor Donnelly replied that the concert was off because Fact Concert had not lived up to the contract.

According to the official minutes, no reports on public safety were made during the special meeting, nor do the minutes show the presence of the Chief of Police or the Fire Chief, who would surely have been present if public safety had been a significant concern. Years later at trial, the councilmen characterized themselves as concerned with public safety, but the minutes taken at the time of the special meeting make absolutely no mention of any such concern.

An announcement that the concert would not take place was made after the special meeting. The news spread widely that night over the local media. At 9:30 the next morning, Fact Concerts obtained an order in state court restraining the City of Newport from revoking the license. The concert went on and Blood, Sweat and Tears performed without incident. Over the two days of the concert, only 6,308 of the available 14,000 tickets (7,000 each day) were sold, and the event showed a loss of $72,910.00.

## Travel of the Case

Fact Concerts and Lerman brought a five-count complaint against the petitioners in the United States District Court for the District of Rhode Island. The plaintiffs sought declaratory relief and compensatory and punitive damages for violations of their first and fourteenth amendment rights, and compensatory and punitive damages for acts alleged in three state law claims. The complaint asserted that the federal claims arose under the first and fourteenth amendments and under 42 U.S.C. § 1983 (1976), with district court jurisdiction arising under 28 U.S.C. §§ 1331, 1343(3) (1976). The complaint also asserted that the district court should exercise pendent jurisdiction over the state law claims.

The case came to trial on January 16, 1979, before Chief Judge Raymond J. Pettine and a jury. Less than a year before the events that triggered the present litigation, this same judge had found it necessary to issue an injunction against Mayor Donnelly and these same councilmen mandating that they allow a peaceful demonstration to be held in a public park.

After five days of trial testimony, the trial judge sent two counts to the jury. The federal claims became Count I. One of the state claims became Count II. The jury returned verdicts for the plaintiffs on both counts and levied compensatory damages against all the defendants in the amount of $72,910.00. The jury also awarded punitive damages against the City of Newport in the amount of $200,000.00 and against Mayor Donnelly and the councilmen in varying amounts totalling another $75,000.00.

In his Opinion and Order dated July 2, 1979, Chief Judge Pettine denied the defendants' motion for judgment notwithstanding the verdict. As for the defendants' motion for a new trial, the court ordered a remittitur, setting $75,000.00 as the maximum permissible punitive damages award against the City. The plaintiffs accepted the remittitur on July 9, 1979. The defendants appealed, and the United States Court of Appeals for the First Circuit affirmed on June 17, 1980.

## Argument

### I. The Petitioners Failed To Object to the Charge to the Jury on Punitive Damages and Hence Cannot Now Argue that Punitive Damages Cannot Be Levied Against a Municipality in a Section 1983 Action.

The petitioners admit that they failed to preserve their objection to the trial judge's charge on punitive damages. Brief for the Petitioners at 10, 27. Federal Rule of Civil Procedure 51 explicitly bars appeal on issues not raised by objection, and that rule is strictly adhered to because it "is of considerable importance for the orderly and just functioning of the judicial system." *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976) (citation omitted).

The cases upon which the petitioners rely[1] in arguing that this Court should make an exception to the rule involve entirely different circumstances. Here, the trial judge's charge was in line with the relevant statements made by this court, *see Carlson* v. *Green*, 100 S. Ct. 1468, 1473 (1980) (dictum) (punitive damages available in section 1983 actions); *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) (munici-

[1] Not surprisingly, the petitioners have abandoned their earlier argument that their counsel's failure to object is somehow excused by the fact that municipalities had only recently been deemed amenable to suit under section 1983, *see* Petition for a Writ of Certiorari at 9. In fact, the petitioners' counsel had ample notice of what was at issue. The respondents' complaint and amended complaint both asked for punitive damages. The respondents' pretrial memoranda discussed punitive damages as well as *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) (municipalities liable under section 1983). During the trial, the judge reminded counsel that there was a prayer for punitive damages, and the respondents' counsel prepared a memorandum on the liability of a municipality for punitive damages (at the Judge's request made to both sides in chambers) which was hand delivered to the petitioners' counsel on the last day of the trial. Finally, the trial judge specifically invited the petitioners' counsel to object at the end of the instructions.

palities liable under section 1983), and was inconsistent with none of the earlier cases on point, *see* cases cited pp. 11-12 *infra*. In each of the cases relied on by the petitioner, on the other hand, the trial judge failed to instruct the jury correctly on a well established principle of law, committing an error so blatant that the appellate court could not let the jury's verdict stand while remaining faithful to the principle that litigants are governed by the rule of law. In *O'Brien* v. *Willys Motors, Inc.*, 385 F.2d 163 (6th Cir. 1967), for example, the trial judge failed to tell the jury which party bore the burden of persuasion on the issue of contributory negligence. In *Ferrara* v. *Sheraton McAlpin Corp.*, 311 F.2d 294 (2d Cir. 1962), the trial judge failed to give the jury "the minimum guidelines necessary and appropriate for responsible decision" on the issue of constructive notice, *id.* at 297, and in *McNello* v. *John B. Kelly, Inc.*, 283 F.2d 96 (3d Cir. 1960), the trial judge failed to instruct the jury on the legal standard of care to be applied.

The analogy drawn by the petitioners to the decision on which they most heavily rely, *Williams* v. *City of New York*, 508 F.2d 356 (2d Cir. 1974), is equally attenuated. The trial judge there failed to inform the jury that they need find some nexus between the illegal actions of officials and the City before finding the latter liable for punitive damages. Not only was the charge clearly erroneous, but the appellate court was faced in that case with an award of punitive damages which was particularly indefensible. The plaintiff had not even attempted to show any "nexus between the officers whose conduct [was] at issue and their superiors," and, in any event, twenty-five years had elapsed since the violation without a recurrence so that the claim for punitive damages should have failed because there was no need for deterrence. *Id.* at 361.

In the present case, on the other hand, the officials acted on behalf of the City by formal vote. In addition to this full nexus between the officials and the City, the need for deterrence is abundantly clear here. This case marked the second instance

within a year in which the Newport City Council had disregarded first amendment rights, an injunction having previously been necessary to require the City Council to allow a peaceful demonstration in a public park. With that injunction still fresh in their minds and their City Solicitor advising them that they did not have authority to pass judgment on the list of performers, the same officials went ahead anyway and repeated the unlawful act. Indeed, the officials were so aware that their act was unlawful that they attempted to disguise it with a ruse, pretending that they were acting because of a supposed breach of the contract by Fact Concerts. The jury thus had before it a compelling indication that stern measures were necessary. Clearly, the unobjected-to instruction on punitive damages was not a "miscarriage of justice," Brief for the Petitioners at 27. It was the proper response to the need to deter more wanton and malicious conduct in the future.

## II. The Trial Judge Was Correct in Instructing the Jury That Punitive Damages Could Be Levied Against a Municipality in a Section 1983 Action.

This Court has stated repeatedly that deterrence is a primary purpose of section 1983. For example, in declining to allow a good faith immunity to municipalities in section 1983 actions, the Court said: "Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. *See Robertson* v. *Wegmann*, 436 U.S. 584, 590-591, 98 S. Ct. 1991, 1995, 56 L. Ed. 2d 554 (1978); *Carey* v. *Piphus*, 435 U.S. 247, 256-257, 98 S. Ct. 1042, 1048-1049, 55 L. Ed. 2d 252 (1978)." *Owen* v. *City of Independence*, 100 S. Ct. 1398, 1416 (1980). Indeed, the deterrence objective was "central to the expansion of liability in *Owen*." *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 77, 221 (1980). In an earlier case, Justice White declared that deterrence is "precisely the proposition upon

which § 1983 was enacted." *Imbler* v. *Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring in the judgment). *See generally Monroe* v. *Pape*, 365 U.S. 167, 174-80 (1961) (extensive examination of the legislative history of section 1983); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 32 (1974) (section 1983's purposes "while including compensation, seem in larger part designed to provide for private enforcement of [constitutional] rights *and hence to help deter their violation*") (emphasis added); Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. Cal. L. Rev. 1322, 1369 (1976) ("deterrence purposes of section 1983"); Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 Harv. L. Rev. 966, 980-81 (1980) ("The legislative history of section 1983 makes clear that the statute was primarily intended to deter violations of [constitutional] rights.") (citations omitted).

Using extensive quotations from this Court's opinions, the petitioners amply demonstrate that punishment as a means to the end of deterrence has been the rationale for making punitive damages available under federal law. *See* Brief for the Petitioners at 9, 18-21. Understandably, the petitioners then do their best to ignore the crucial link between punishment and the goal of deterrence.[2] *See id.* at 9, 22-24. "Understandably," we say, because the objective of deterrence is admirably served by an assessment of punitive damages against a municipality in

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[2] Punishment for punishment's sake falls instead under the vindication-of-society rationale for punitive damages, *see* Brief for the Petitioners at 17 (distinguishing between the vindication-of-society rationale and the deterrence rationale); *cf.* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989, 1049-50 (1978) (dividing the goals of criminal justice into punishment for punishment's sake and punishment as a means to other ends). Basically, the flaw in the petitioners' argument is that, having correctly identified punishment as a means to the end of deterrence as the rationale behind punitive damages, the petitioners proceed to analyze the question in terms of the punishment-for-punishment's-sake rationale.

a case where officials have demonstrated a continued bad faith disregard for constitutional rights. The objective was *particularly* well served by the remedy in this case because these same officials had previously failed to be deterred by a remedy that did not implicate the taxpayers' interests. As the district court pointed out in its opinion below:

> In some circumstances, however, a punitive award against a municipality may serve beneficial purposes. The payment of such an award necessarily serves to focus taxpayer and voter attention upon the malicious acts of the municipal government. This attention, in turn, may well have a beneficial effect in the next election. To characterize the municipality's voters and taxpayers as innocent victims of a punitive award does not comport with our theory of representative democracy; each voter/taxpayer is responsible, of course, for the election and formation of a government that will uphold and defend the Constitution. This responsibility is the essence of representative government. It bears repeating that the government of the United States stems from the people. The wrongs of the government, even if it betrays the electorate, are theoretically the wrongs of the people; the people may always exorcise those wrongs through the democratic process. The votes of the electorate, stirred by their pocketbooks, constitute one of the strongest corrective forces in American law. Therefore it should come as no surprise that federal courts have indicated a willingness, in other contexts, to hold cities liable for punitive damages.

*Fact Concerts, Inc.* v. *City of Newport*, No. 76-0071 (D. R.I. July 2, 1979), *reprinted in* Petition for a Writ of Certiorari at B-1, B-9 (citations omitted). Similarly, no court considering a section 1983 action against a municipality in which the plaintiff sought punitive damages has ever held such a damage award to be unavailable. *See, e.g., Simineo* v. *School District No. 16*, 594

F.2d 1353 (10th Cir. 1979); *Bradshaw* v. *Zoological Society*, 569 F.2d 1066 (9th Cir. 1978); *Ray* v. *City of Edmond*, No. 80-856-E (W.D. Okla. Nov. 26, 1980), *appeal docketed*, No. 81-1155 (10th Cir. Feb. 11, 1981); *North American Cold Storage Co.* v. *County of Cook*, 468 F. Supp. 424 (N.D. Ill. 1979); *Cook* v. *City of Miami*, 464 F. Supp. 737 (S.D. Fla. 1979); *Burnaman* v. *Bay City Independent School District*, 445 F. Supp. 927 (S.D. Tex. 1978).

None of the counterarguments advanced by the petitioners withstand examination. The statement that "no actor is deterred from a repetition of his wrong except to the extent that he is a taxpayer," Brief for the Petitioners at 24, simply ignores the indirect deterrent effect brought about by the electoral process after punitive damages are awarded against a municipality. The petitioners no doubt base this oversight on the farfetched contention that this Court would be improperly interfering with Newport's local affairs if it sought to deter the guilty officials by bringing their bad faith pointedly to the attention of the Newport electorate, *see id.* at 8-9, 15-17. The use of this argument is surprising in light of its unequivocal rejection in this Court's most recent discussion of municipal liability under section 1983:

> That common-law doctrine [of municipal immunity for "discretionary" functions] merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in *Sterling* v. *Constantin*, 287 U.S. 378, 398, 53 S. Ct. 190, 195,

> 77 L. Ed. 375 (1932), "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

*Owen, supra,* 100 S. Ct. at 1415. Moreover, a deterrent remedy is actually less intrusive than the ongoing intervention to which a court might eventually have to resort if the illegal behavior continues undeterred. *See* Note, *Developments in the Law—Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1218 n.162 (1977); *cf.* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice,* 93 Harv. L. Rev. 1 (1979) (discussing structural remedies).

The petitioners' contention that the Court's decision in *Owen* makes good faith unavailable to municipalities as a defense to a claim for *punitive* damages, Brief for the Petitioners at 24, is flatly in error. The Court in *Owen* ruled only that good faith was unavailable to municipalities as a defense to a claim for *compensatory* damages; the holding is simply inapposite to the question of punitive damages. No one contends that punitive damages should be awarded in the absence of egregious conduct on the part of the guilty officials. Indeed, a good faith defense was raised in this case and would have saved the municipality from an award of punitive damages had it succeeded. Punitive damages were levied against Newport in this case not because a good faith defense was unavailable, but because the guilty officials failed totally in making out such a defense. The respondents contend only that when officials act in bad faith and, through their malicious disregard for constitutional rights, clearly demonstrate the need for the deterrence which an award of punitive damages against the municipality would provide, such an award should be made.

In much the same way, the petitioners' reliance on the fact that *Owen* spoke only in terms of compensatory damages, Brief

for the Petitioners at 9, 22-24, is misplaced. The Court's discussion in *Owen* was limited to compensatory damages because the officials there, unlike the officials here, had acted in good faith. Punitive damages were not mentioned because the situation did not call for them. Indeed, Justice Brennan, the author of *Owen*, has elsewhere spoken for the Court in endorsing punitive damages in section 1983 cases. *See Carlson, supra*, 100 S. Ct. at 1473 (dictum) (explaining that punitive damages were not awarded in *Carey* v. *Piphus*, 435 U.S. 247 (1978), because the district court found that the defendants had not acted maliciously). Moreover, in the portion of the *Owen* opinion in which the Court laid out its general approach to section 1983 cases, the Court heavily emphasized the deterrent effect of municipal liability. *See* 100 S. Ct. at 1416. Far from supporting the petitioners' contention, *Owen* renders the petitioners' position untenable. *See* pp. 9-11 *supra*.

The petitioners' use of the legislative history of the Civil Rights Act of 1871, *see* Brief for the Petitioners at 8, 14-15, is hard to explain in light of the Court's decision in *Monell, supra*. The only excerpt from the congressional debate that the petitioners choose to quote is Representative Blair's admonition that Congress should not add to the "obligations" of municipalities, Cong. Globe, 42nd Cong., 1st Sess. 795 (1871). But the petitioners' apparent reading of Representative Blair's statement—that it indicates congressional disapproval of the imposition of liability on municipalities for constitutional violations committed by officials in the exercise of their duties—was explicitly rejected by this Court in *Monell*, 436 U.S. at 664-90. As the Court there made clear, Representative Blair's argument—and, for that matter, the opposition to the Sherman Amendment to the Civil Rights Act in general—was aimed only at the imposition of liability on municipalities for failure to perform tasks *that they were under no legal duty to perform*. Specifically, the opponents of the Sherman Amendment were opposed to the imposition of liability on municipalities for failure to prevent Ku Klux Klan violence. Municipalities were

under no legal duty to do so and, indeed, often were legally powerless to maintain police forces for any reason. The opposition simply did not extend, the Court expressly concluded, 436 U.S. at 690, to the imposition of liability on municipalities for violation of the legal duties imposed on them by the Constitution. While a municipality could not "be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality [could not] be held liable under § 1983 on a *respondeat superior* theory," *id.* at 691, the Court concluded that Congress had intended for municipalities to be liable under section 1983 as long as "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers," *id.* at 690.

Finally, the petitioners argue, based on *Owen*, 100 S. Ct. at 1408-15, that because it was established in the common law as of 1871 that punitive damages could not be awarded against municipalities, the same limitation should be incorporated into section 1983. *See* Brief for the Petitioners at 7, 10-14. *See also id.* at 10, 25-26 (noting continued disapproval in the common law since 1871 of punitive damage awards against municipalities). While this Court certainly on occasion has deemed section 1983 to incorporate common law doctrines, *see, e.g., Carey* v. *Piphus*, *supra* (measurement of compensatory damages); *Procunier* v. *Navarette*, 434 U.S. 555 (1978) (qualified immunity for state prison officials); *Imbler* v. *Pachtman*, *supra* (absolute immunity for prosecutors); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (qualified immunity for state hospital superintendent); *Wood* v. *Strickland*, 420 U.S. 308 (1975) (qualified immunity for local school board members); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (qualified immunity for state executive officials); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (absolute immunity for judges; qualified immunity for police officers); *Monroe* v. *Pape*, *supra*, at 187 (willful intent not required for liability); *Tenney* v. *Brandhove*, 341 U.S.

367 (1951) (absolute immunity for legislators), the petitioners grossly overstate the matter when they assume that such incorporation is automatic.

It cannot be emphasized too strongly that the effectuation of the underlying goals of section 1983 takes precedence over a mechanical invocation of common law tort rules. As the Court stated in *Owen:* "Where the immunity claimed by the defendant was well-established at common law at the time § 1983 was enacted, *and where its rationale was compatible with the purposes of the Civil Rights Act,* we have construed the statute to incorporate that immunity," 100 S. Ct. at 1409 (emphasis added). In *Owen,* after giving the fact that no such immunity existed at common law in 1871 as one reason for not allowing a good faith immunity to municipalities in section 1983 actions, *see id.* at 1408-15, the Court advanced as equally dispositive the fact that the goals of section 1983 would not be achieved if such an immunity were allowed: "Our rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy." *Id.* at 1415. Indeed, it has been suggested that the common law as of 1871 provides no guidance on the question involved in *Owen,* so that the decision in the case necessarily hinged on the Court's effectuation of the underlying goals of section 1983. *See The Supreme Court, 1979 Term, supra,* at 219-20. The inadequacy of a mechanical approach was made especially clear when the *Owen* Court acknowledged that the common law of 1871 included an immunity for municipalities acting in their "governmental," as opposed to their "proprietary" capacity, but deemed this sovereign immunity notion to have been "obviously abrogated by the sovereign's enactment" of section 1983, 100 S. Ct. at 1412-14.

There have been numerous other indications that the achievement of the purposes behind section 1983 requires deviation from common law tort doctrines. In *Imbler* v. *Pachtman,*

*supra*, for example, the Court stated: "The common-law rule of immunity is thus well settled. *We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983.*" 424 U.S. at 424 (emphasis added) (citation omitted). In *Wood* v. *Strickland, supra,* the Court settled on a qualified immunity for local school board members partly because "[a]ny lesser standard would deny much of the promise of § 1983." 420 U.S. at 322. And in *Scheuer* v. *Rhodes, supra,* the Court cautioned: "Final resolution of this question [whether state executive officers were entitled to an absolute immunity—the Court eventually held that they were not—] must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, *as well as the purposes of 42 U.S.C. § 1983.*" 416 U.S. at 243 (emphasis added). In *Monell, supra,* in a prime example of the process at work, this Court refused to incorporate the common law doctrine allowing municipal liability on a *respondeat superior* theory because such liability would not help achieve the goals of section 1983. *Compare* 436 U.S. at 691-94 *with Carter* v. *Carlson,* 447 F.2d 358, 368-70 & n.39 (D.C. Cir. 1971) (adopting *respondeat superior* theory from common law tort doctrine for use in section 1983 action against municipality). *See* Note, *Damage Awards for Constitutional Torts, supra,* at 976. A mechanical incorporation of common law rules would be particularly ironic given that the entire modern interpretation of section 1983 rests on a determination that state tort law is not adequate to protect federal constitutional rights. *See Monroe* v. *Pape, supra,* at 172-83; *Howell* v. *Cataldi,* 464 F.2d 272, 278 (3d Cir. 1972) ("The seminal case of *Monroe* did not conceptualize the right as one that tracks exclusively the footprints of tort law."); Note, *Damage Awards for Constitutional Torts, supra,* at 976 ("Since *Monroe* refused to allow the *existence* of parallel state remedies to bar 1983 actions, it was ironic for [other cases] to work from the assumption that the doctrinal limits on state tort remedies should

restrict the scope of 1983 relief."). *See generally* Nahmod, *supra*, at 32-33 ("But courts in 1983 cases must be careful not to let tort law alone determine 1983 liability, for not only possibly different purposes, but different interests as well are usually at stake. A federal common law for 1983 liability should modify tort law wherever appropriate."); Yudof, *supra*, at 1369 ("Questions of interpretation about section 1983, including the proper standard of damages, should be answered so as to effectuate these purposes [of section 1983]. In general terms, this means that section 1983 will be interpreted aggressively to deter future violations of constitutional rights.") (citation omitted); Note, *Damage Awards for Constitutional Torts*, *supra*, at 976 ("At times courts have eschewed the 'background of tort liability' when it appeared to conflict with the letter and intent of the statute.") (citation omitted).

Congress' intention as regards a conflict between the need to effectuate the underlying objectives of section 1983 and the petitioners' desire to incorporate a common law rule developed in a different context would seem to have been made clear when Representative Shellabarger, the House sponsor of the bill that became the Civil Rights Act, stated:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871).

As shown earlier, deterrence is a key consideration of which this Court cannot lose sight if it is to ensure that Congress' objectives in enacting section 1983 are achieved. *See* pp. 9-10 *supra*. The officials in the present case had violated first amendment rights before, but despite the injunction that had issued in the previous case they had knowingly violated first amendment rights again. With this behavior in mind, the jury decided that only a remedy implicating the taxpayers' interests would prevent more violations in the future. The officials' conduct having clearly demonstrated the need for the deterrence provided by an award of punitive damages against the municipality, the realization of Congress' intent requires that such a remedy be available.

## Conclusion

For the reasons stated above, this Court should affirm the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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No. 80-396

# In the Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

v.

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## REPLY BRIEF FOR THE PETITIONERS

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## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| I. | The Punitive Award as a Deterrent | 1 |
| II. | Further Legislative History | 5 |


### TABLE OF CITATIONS

*Cases*


*Carey* v. *Piphus*, 435 U.S. 247 (1978) ..... 2, 3, 4
*Imbler* v. *Pachtman*, 424 U.S. 409 (1976) ..... 2
*McGarry* v. *President and Council of Lafayette*, 12 Rob. 674, 43 Am. Dec. 239 (1846) ..... 7
*Owen* v. *City of Independence*, 100 S.Ct. 1398 (1980) ... 2
*Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) ..... 2
*Tenney* v. *Brandhove*, 341 U.S. 367 (1951) ..... 2, 3
*Wood* v. *Strickland*, 420 U.S. 308 (1975) ..... 2


*Miscellaneous*


43 Congressional Globe, 1st Session (1871) ..... 5, 6, 7, 8

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## REPLY BRIEF FOR THE PETITIONERS

### I. THE PUNITIVE AWARD AS A DETERRENT

The respondents suggest in their brief that this Court should ignore both the historic immunity from punitive awards enjoyed by municipalities in the United States as it existed in 1871 and today and the societal consequences of permitting such awards on the rather thin theory that the purposes of Section 1983 will somehow be furthered by abrogating the traditional immunity.

They argue that punishing the generally innocent taxpayer will focus his outrage on city officials to the point where the

"rascals will be turned out" at the next election thus promoting the deterrent purpose of the Act.

But is this so? There are always more eligible voters than taxpayers. And no one who is not a taxpayer feels the deterrence.

Nowhere in their brief do respondents address themselves to the question of guilt—a *sine qua non* to the award of punitive damages.

If the officials have not acted in good faith or maliciously they are liable and, as here, can be made to respond in both compensatory and punitive damages. Is that not a real deterrence? How much more by way of furthering the purpose of the Act is accomplished by punishing the municipal taxpayer.

Does it really make sense to suggest that a municipal officer knowing that he may be individually liable will behave better if he is also made aware that the taxpayers will share his liability? Of course not.

The respondents also suggest at page 16 of their brief "that the effectuation of the underlying goals of section 1983 takes precedence over a mechanical invocation of common law tort rules".

The petitioners do not urge a "mechanical application" of a common law rule but rather the recognition of a traditional immunity "so firmly rooted in the common law and. . . supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Owen* v. *City of Independence*, 100 S.Ct. 1398 (1980).

If this were not so, it is impossible to rationalize this court's holdings in *Carey* v. *Piphus*, 435 U.S. 247 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Strickland*, 420 U.S. 308 (1975) or *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

Neither does it explain the following language from *Tenney* v. *Brandhove*, 341 U.S. 367 (1951):

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute...were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U.S., at 376."

The respondents repeatedly stress "deterrence" as a "key consideration" of the objectives of Section 1983 (Respondents' Brief p. 19).

That argument ignores completely this Court's undivided opinion in *Carey* v. *Piphus*, (supra) where the Court noted:

> "Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument. Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.
>
> Our legal system's concept of damages reflects this view of legal rights. 'The cardinal principle of damages in

Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty.' 2 F. Harper & F. James, Law of Torts § 25.1. p. 1299 (1956) (emphasis in original). The Court implicitly recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions 'found. . . to have been violative of. . . constitutional rights and to have caused compensable injury. . . .' Wood v. Strickland, 420 U.S., at 319 (emphasis supplied); see Codd v. Velger, 429 U.S. 624, 630-631 (1977) (Brennan, J., dissenting); Adickes v. S. H. Kress & Co., 398 U.S. 144, 232 (1970) (Brennan, J., concurring and dissenting); see also Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388, 397 (1971) (action for damages directly under Fourth Amendment); id., at 408-409 (Harlan, J., concurring in judgment). The lower federal courts appear generally to agree that damages awards under § 1983 should be determined by the compensation principle.

"The members of the Congress that enacted § 1983 did not address directly the question of damages, but the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871. Two other sections of the Civil Rights Act of 1871 appear to incorporate this principle, and no reason suggests itself for reading § 1983 differently. To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. See Imbler v. Pachtman, 424 U.S., at 442 (WHITE, J., Concurring in judgment)."

This is not a voting rights case or a procedural due process case in which compensatory damages are difficult or impossible to prove in the face of a clear wrong. Here the damages were virtually mechanically provable and literally unchallenged.

The respondents were compensated in the *full* amount of their loss by the jury. They recovered punitive damages against the actors.

To the extent that the Act is remedial, a remedy has been supplied.

## II. Further Legislative History

The respondents paradoxically enough have faulted petitioners first for referring to the Legislative history of the Civil Rights Act of 1871 at all and secondly for quoting it so sparingly. See Brief for the respondents at page 14. Petitioners herein shall first remedy respondents' second charge, then reply to respondents' first charge.

Representative Blair's argument, notwthstanding respondents' intimations otherwise, was not aimed only at the imposition of liability on municipalities for failure to perform tasks that they were under no legal duty to perform. An examination of the debate surrounding passage of the Sherman Amendment amply illustrates that the possibility of a new and ruinous liability to be imposed upon the municipalities was a critical concern to Congress. Representative Kerr, a vocal opponent to the Civil Rights Act of 1871 in general, and the Sherman Amendment in particular, stated in opposition to that latter amendment,

> "I now come to inquire is it competent for the Congress of the United States to punish municipal organizations of this kind in this way at all, with or without notice? My judgment is that such power nowhere exists; that it cannot be found within the limits of the Constitution; that its exercise cannot be justified by any rational construction

of that instrument. I hold that the Constitutional power of the federal government to punish the citizens of the United States for any offenses punishable by it at all may be exercised and exhausted against the individual offender and his property; but when you go one inch beyond that you are compelled, by the very necessities which surround you, to invade powers which are secured to the States, which are a necessary and most essential part of the autonomy of state governments, without which there can logically be no State government. For it must be remembered that if you can impose these penalties at all upon the counties, parishes or cities, and can invade their treasuries or control their ministerial offices to any extent whatever, your power is unlimited, it may go to any extent you please, it may take the entire control of all these officers of the State governments, and thus practically and substantially break down those governments, putting everything and everybody under the sovereign world and pleasure of the Congress of the United States."

42 Congressional Globe 1st Session 788 (1871).

Representative Butler of Massachusetts, in response to Mr. Kerr's arguments, states at page 792:

"The invalidity of the gentleman's argument is that he looks upon this as a punishment for the county. Now, we do not look upon it as a punishment at all. It is a mutual insurance. We are there a community, and if there is any wrong done by our community, or by the inhabitants of our community, we will indemnify the injured party for that wrong, to the value, in our case, of three-fourths of the damages. We will not say to the man who has suffered the loss, 'you shall bear our losses alone;' but we will stand up manfully, put our hands in our pockets and pay our share of the loss, in order to make good his damage; we will bear equally with him the burden and the wrong.

> "The difficulty in the argument—altogether on the other side—has been that this has been treated as if it were a punitive section only. It is not. It is an insurance section. It insures the citizen the protection of the laws; and the considerations as to the want of power to punish or the want of power to interfere with crimes in the States nowhere applies to this section. It is not punitive or penal, but remedial simply. And the question comes up whether the United States, under our Constitution, has the power to give a remedy to the citizen when he is wronged."

In language curiously reminiscent of the Supreme Court of Louisiana's opinion in *McGarry* v. *President and Council of Lafayette*, 12 Rob. 674, 43 Am. Dec. 239 (1846), Representative Poland states in opposition to the Sherman Amendment:

> "Some gentlemen and among them the gentleman from Tennessee (Mr. Maynard), seem to have failed entirely to notice the distinction between these municipal organizations and ordinary business corporations, and to suppose that the national government can deal with one precisely as with the other. A business corporation, as a bank, railroad company, or manufacturing corporation, is in effect nothing but a partnership. It is an association of persons for a business venture or an enterprise. The corporate character given is in effect nothing but a partnership. It is an association of persons for business venture or an enterprise. The corporate character given to it is for mere business convenience, to give it more permanent existence, to prevent dissolutions upon the death of a member, to facilitate the transfer of interest in it, and to enable it to sue without joining all the partners or shareowners as parties, and save it suits from abatement by death or transfer of interest. In fact and substance it is

a mere private partnership, may be taxed and otherwise dealt with by the general government in the same way and to the same extent as a firm. Counties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State and are subject only to such duties and liabilities as State laws impose upon them. In a sense they are corporations, but with only such powers and subject to such burdens as a State may deem advisable.

"The national Government has the fullest power of taxation, either by the imposition of duties on imports or upon the products and business of our own country. It may punish frauds upon its revenue, derived in either form. It may provide for forfeiture of smuggled goods or of illicit distilleries. Indeed, the power of the Government in this respect is hardly a definable extent. But what would be thought of in national law which should impose a penalty upon the town in which a successful smuggler lived, or where an illicit distillery should be run, or give an action against a town for the loss of the Government in duties or taxes, by such operations? But it would be equally in the power of the national Government to do this as to enact this Senate Amendment. I say again, it seems to me that legal gentlemen who support it cannot have given it proper thought." 42 Congressional Globe, 1st Session 794 (1871).

It is clear, beyond any argument, that the imposition of a punitive award upon a municipality was abhorrent to the members of the 42nd Congress.

Since it is the duty of this Court to determine the intent of the Legislators, the legislative history of the Civil Rights Act of 1871 has been and always will be crucial to any conflict arising

regarding the interpretation of 42 U.S.C. Section 1983. The respondents' contention that the legislative history should not be considered is the ultimate folly. In this case, the Legislative intent is clear on the record. More importantly, the bearing rationale which prompted the members of the 42nd Congress to deplore the imposition of punitive liability upon a municipality remain entirely valid today. The passage of time has not muted their arguments. The respondents cannot silence them.

Respectfully submitted,

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NO. 80-396

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*Petitioners,*

*vs.*

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*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

# BRIEF OF ACLU FOUNDATION, SOUTHERN CALIFORNIA AND AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE AS AMICI CURIAE

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## QUESTION PRESENTED

Does a municipality have an absolute immunity from punitive damages in an action under 42 U.S.C. § 1983?

## TOPICAL INDEX


| | Page |
|---|---|
| Question Presented | i |
| Topical Index | ii |
| Table of Authorities Cited | iii |
| Brief of ACLU Foundation, Southern California and American Civil Liberties Union, Rhode Island Affiliate As Amici Curiae | 1 |
| Consent | 2 |
| Interest of Amici Curiae | 2 |
| Summary of Argument | 3 |
| Argument | 6 |
| I The question of whether to extend absolute immunity from punitive damages under 42 U.S.C. § 1983 to municipalities must be viewed in light of the fact that municipal liability under § 1983 will otherwise occur only when the municipality is itself responsible for the constitutional violation | 6 |
| II The historical immunity of municipalities from punitive damage awards was in a context qualitatively different than that which exists under *Monell* liability | 10 |
| II Punitive damage awards are a necessary tool for the meaningful enforcement of constitutional rights through the remedial provision of 42 U.S.C. § 1983 | 14 |

## TOPICAL INDEX


| Argument (cont'd) | Page |
|---|---|
| IV Municipal liability for punitive damages is appropriate because it will be limited to cases in which the municipality will be at fault, and where there is a showing of malice or bad faith by policy-making officials | 20 |
| V The American public has an interest in the vigorous enforcement of constitutional protections that supersedes the financial interests of individual communities and the political interests of local officials | 25 |
| Conclusion | 28 |


## TABLE OF AUTHORITIES CITED

### Cases


Addickes v. S. H. Kress & Co., 398 U.S. 144 (1970) ..... 24

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) ..... 16, 19

Black v. Brown, 513 F.2d 652 (5th Cir. 1975) .. 21

Bradshaw v. Zoological Society of San Diego, 569 F.2d 1066 (9th Cir. 1978) ..... 28

Burt v. Abel, 585 F.2d 613 (4th Cir. 1978) ..... 17, 23

Carey v. Piphus, 435 U.S. 247 (1978) ..... 9, 18, 25

Carlson v. Green, ..... U.S. ..... , 100 S. Ct. 1468 (1980) ..... 13, 15, 19, 25

## TABLE OF AUTHORITIES CITED


| Cases (cont'd) | Page |
|---|---|
| Chicago v. Langlass, 52 Ill. 256, 4 Am. Rep. 603 (1869) | 12 |
| Chicago v. Martini, 49 Ill. 241, 95 Am. Dec. 590 (1868) | 12 |
| City Council of Montgomery v. Gilmer & Taylor, 33 Ala. 116, 70 Am. Dec. 562 (1858) | 11 |
| Coffy v. Multi-County Narcotics Bureau, 600 F.2d 570 (6th Cir. 1979) | 21 |
| Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) | 22 |
| Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916, rehearing denied, 439 U.S. 886 | 16 |
| Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) | 9 |
| Edelman v. Jordan, 415 U.S. 651 (1972) | 7 |
| Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974) | 23, 24 |
| Fulton Market Cold Storage v. Cullerton, 582 F.2d 1071 (7th Cir. 1978) | 28 |
| Guzman v. Western State Bank of Devils Lake, 450 F.2d 948 (8th Cir. 1976) | 18, 19, 23, 24 |
| Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976) | 21 |
| Herfurth v. Corporation of Washington, 6 Dist. Col. 288 (1868) | 12 |

## TABLE OF AUTHORITIES CITED


| Cases (cont'd) | Page |
|---|---|
| Holland v. Connors, 491 F.2d 539 (5th Cir. 1976) | 16 |
| Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299 (1877) | 12 |
| Imbler v. Pachtman, 424 U.S. 409 (1976) | 7 |
| Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973) | 12, 13 |
| Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978) | 22 |
| Jones v. Marshal, 528 F.2d 132 (2d Cir. 1975) | 8 |
| Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976) | 16, 20, 21 |
| McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) | 8 |
| McGary v. President and Council of Lafayette, 12 Rob. 674, 43 Am. Dec. 239 (1846) | 12 |
| Milton v. Nelson, 527 F.2d 1158 (9th Cir. 1976) | 19 |
| Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) | 3, 4, 6, 9, 11, 20, 22, 28, 29 |
| Monroe v. Pape, 365 U.S. 167 (1961) | 3, 6 |
| Order of Hermits of St. Augustine v. County of Philadelphia, 4 Clark 124, Brightly NP 116 (1847) | 12 |
| Owen v. City of Independence, Mo. ..... U.S. ..... 100 S. Ct. 1398 (1980) | 6, 8, 9, 10, 11, 12, 19, 27, 28 |
| Owens v. Haas, 601 F. 2d 1242 (2d Cir. 1979) | 22, 23 |

## TABLE OF AUTHORITIES CITED


| Cases (cont'd) | Page |
|---|---|
| Pierson v. Ray, 386 U.S. 547 (1967) | 7 |
| Pinckey v. Northampton County, 433 F. Supp. 373 (W.D. Pa. 1976) | 8 |
| Procunier v. Navarette, 434 U.S. 555 (1978) | 7 |
| Reimer v. Short, 578 F.2d 621 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979) | 8 |
| Reitman v. Mulkey, 387 U.S. 369 (1967) | 26 |
| Rizzo v. Goode, 423 U.S. 362 (1976) | 15, 16, 18, 20 |
| Robertson v. Wegmann, 436 U.S. 584 (1978) | 9 |
| Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977) | 16, 22 |
| Scheur v. Rhodes, 416 U.S. 232 (1974) | 7, 10 |
| Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1976) (en banc) | 7, 10 |
| Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976) | 18, 23 |
| Simineo v. School Dist. No. 16, Park City, Wyo. 594 F.2d 1353 (10th Cir. 1979) | 28 |
| Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) | 15, 16, 21 |
| Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) | 25 |
| Tenney v. Brandhove, 341 U.S. 367 (1951) | 7 |
| United States v. Classic, 313 U.S. 299 (1941) | 26, 27 |
| Wood v. Strickland, 420 U.S. 308 (1975) | 7 |

## TABLE OF AUTHORITIES CITED

**Cases (cont'd)** **Page**

Woodman v. Nuttingham, 49 N.H. 387, 6 Am. Rep. 528 (1870) ..... 12

Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978) .... 27

**Statutes (United States)**

Title 42 United States Code
§ 1981 ..... 7

§ 1983 ..... 2, 3, 4, 5, 6, 8, 9, 10, 13, 14, 15, 19, 20, 21, 22, 23, 25, 26, 28

§ 1988 ..... 18

**Text**

Restatement (2d) of Torts § 10 (1965) ..... 8

W. Prosser, Law of Torts, (4th Ed. 1971) ..... 12, 13, 14, 17, 18, 24, 28

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## CONSENT

By consent of the petitioner and respondent herein, filed separately with the Clerk of the Supreme Court by each such party, ACLU Foundation, Southern California and American Civil Liberties Union, Rhode Island Affiliate file this brief as *amici curiae.*

## INTEREST OF AMICI CURIAE

The *amici curiae,* the ACLU Foundation, Southern California, and American Civil Liberties Union, Rhode Island Affiliate, nonprofit corporations existing for the purpose of preserving the Bill of Rights of the Constitution of the United States, have the following interests in this case:

a) ACLU Foundation, Southern California and American Civil Liberties Union, Rhode Island Affiliate represent many persons in the federal and state courts in which the plaintiffs therein are seeking enforcement of constitutional rights, and remedies for deprivations of constitutional rights, under 42 U.S.C. § 1983, the issues therein being substantially similar as those in the instant action; and

b) ACLU Foundation, Southern California and American Civil Liberties Union, Rhode Island Affiliate, who frequently represent persons whose constitutional rights have been violated and who lack the resources with which to pursue a vindication of those rights, are interested in the issue of municipal liability for punitive damages, given that such damages may be the only means of redressing constitutional torts which lack compensable damages.

## SUMMARY OF ARGUMENT

The question of whether a municipality should be accorded absolute immunity from punitive damages under 42 U.S.C. § 1983 must be viewed in light of the *Monell* rule that municipalities may be held liable under § 1983 only when the entity itself is responsible for the constitutional tort. Previous to *Monell*, this Court had construed § 1983 to apply to only natural persons, excluding municipalities only on the basis of statutory construction.

Unlike the question addressed in *Pape* and *Monell*–*i.e.*, whether the term "person" in § 1983 contemplates fictional persons like a municipal corporation–the question posed here is whether a municipality, though otherwise liable under § 1983, should be accorded a privilege, absolving it of punitive damages for malicious constitutional torts by persons acting on behalf of the municipality. Immunity is accorded when the shielding of an official from liability serves some overriding public interest and the privilege is one that is firmly rooted in the common law. The effect of according the privilege sought by petitioner herein will be to exempt a culpable "person" in derogation of the public policy inherent in § 1983 to deter constitutional torts.

The historical immunity of municipalities from punitive damage awards is qualitatively different from the immunity from punitive damages that petitioner herein is seeking. In the former case, the immunity existed in the context of *respondeat superior* liability for many other torts. The strict liability of the *respondeat superior* doctrine is justified by two public policies: a) The deliberate allocation of risk to the public at large, rather than asking the innocent

victim to bear the cost of injury; and b) To give employers incentive to be careful in the selection, instruction and supervision of their agents.

Conversely, the immunity sought by petitioner is in the context of the *Monell* liability rule, which expressly excludes strict liability per *respondeat superior*. Hence, the deterrent effect of the *respondeat superior* doctrine will not be present in the area of constitutional torts, as it is in other tort fields.

Thus, the immunity from punitive damages sought herein is not an immunity "firmly rooted in the common law". The immunity "firmly rooted in the common law" is the one that exists concurrently with strict liability for the compensable portion of the damages. To implement the immunity sought would result in a privilege significantly broader in net effect than the immunity at common law.

Punitive damage awards are a necessary tool for the enforcement of constitutional rights under § 1983, especially when the constitutional tort did not result in compensable harm. In such cases, there may be no other practical remedy, and therefore no other means of deterring future misconduct. In the absence of a punitive damage remedy, there is no incentive for plaintiffs to attempt to redress petty, but outrageous, constitutional torts. Without that incentive, and without the concomitant penalties, the policy of deterrence under § 1983 is undermined in respect to constitutional torts which, though of significant public importance, result in nominal compensable damage.

Punitive damages would not, in any case, be awardable in a § 1983 action against a municipality until there was an adequate showing of liability under *Monell*.

When the municipality has not directly caused the consti-

tutional tort, by legislative enactment or other like regulation, municipal liability for the constitutional torts of senior officials will likely be predicated on criteria similar to those developed for supervisors.

The rules for the award of punitive damages require proof of malice and bad faith, and courts will reduce an award when it is deemed excessive. The fear that the availability of punitive damages will bankrupt municipal corporations is not justified by the historical record for private corporations held similarly liable.

The American public as a whole has an affirmative interest in seeing that municipalities are deterred from future violations of the Constitution, particularly malicious acts of misconduct.

A municipality and its citizenry are not distinguishable legal entities. In many instances, constitutional violations by a municipality may reflect, and may even have been enacted by, the local community. Further, this political system is founded on the principle of republicanism, with political decisions reserved to elected representatives responsible to the electorate.

If the consequences of punitive damage awards is that the public then punishes the responsible officials at the polls, then the deterrence design of § 1983 is working. If the result of awarding such punitive damages against municipalities is the deterrence of future constitutional torts, then that is reason enough to award them.

## ARGUMENT

### I

### The Question Of Whether To Extend Absolute Immunity From Punitive Damages Under 42 U.S.C. § 1983 To Municipalities Must Be Viewed In Light Of The Fact That Municipal Liability Under § 1983 Will Otherwise Occur Only When The Municipality Is Itself Responsible For The Constitutional Violation.

The question presented before this Court is whether a municipality, otherwise liable under 42 U.S.C. § 1983 under the standards set out in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and *Owen v. City of Independence, Mo.*, ..... U.S. ....., 100 S. Ct. 1398 (1980), may be held liable for punitive damages as well. Prior to *Monell*, there was no liability whatever for municipalities under the remedial provisions of 42 U.S.C. § 1983. *See Monroe v. Pape*, 365 U.S. 167 (1961). While *Monroe* was often said to have conferred "immunity" from suit under § 1983 upon all municipalities, in fact the decision merely construed the word "person" to cover only natural persons. *See id.* at 190. In other words, this Court merely held that the statutory language of § 1983 does not contemplate extension of the remedial provisions of § 1983 to governmental entities.

The distinction between an exclusion from liability and an immunity from liability is significant. An exclusion from a statutorily created liability merely reflects a legislative determination as to which parties will be deemed responsible for particular injuries. Thus, while this Court was holding that municipalities may not be sued under § 1983, municipalities

were deemed subject to suit under 42 U.S.C. § 1981. *See Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1972); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1160-61 (9th Cir. 1976) (*en banc*). This distinction was based solely upon the statutory construction of the two sections, with the court relying on the fact that § 1981 does not limit the scope of its applicability by reference to "persons" depriving the rights protected thereby.

An immunity, however, confers a special status for particular "persons" who, though otherwise liable, are shielded from liability to serve some specific public purpose. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors when acting as advocate); *Pierson v. Ray*, 386 U.S. 547 (1967) (absolute immunity for judges when acting within judicial jurisdiction); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute legislative privilege). In each of these cases, this Court concluded that the vigorous and unintimidated performance of critical public functions required that judicial, prosecutorial and legislative officials be afforded the ability to perform their duties without fear of litigation from dissatisfied persons. Similar qualified immunities have been accorded other officials when acting in good faith in the performance of their duties. *See, e.g., Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials and officers); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheur v. Rhodes*, 416 U.S. 232 (1974) (governor and other executive officers); *Pierson v. Ray, supra*, 386 U.S. at 555-57 (police officers).

An immunity from liability is thus a privilege conferred upon certain individuals for an ancillary public purpose. A "privilege, simply stated, is a rule of law exempting one from liability for conduct which would otherwise subject him to

it. *Restatement (2d) of Torts* § 10 (1965)." *Jones v. Marshal*, 528 F.2d 132, 139 (2d Cir. 1975). An immunity, if applicable, is posed as a defense to liability otherwise inhering, and the burden of coming forth with evidence thereof rests with the defendant raising the defense. *See Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1408-09; *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *Pinckey v. Northampton County*, 433 F. Supp. 373 (W.D. Pa. 1976). *Cf. McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) (Title VII good faith defense).

Thus, a holding that a particular official is immune from suit under § 1983 does not indicate that no violation of a constitutional right has occurred but, rather, that the statutory remedy will not be available vis-a-vis that official due to overriding public interest. The practical effect may thereby render the victim of such a constitutional violation without a remedy. It was this potential that lead this Court to conclude that no qualified, good faith immunity should be accorded a municipality in a § 1983 action. *See Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1416-19. This Court reasoned that the public policies served by the qualified immunity accorded state officials attenuates when considered in respect to municipalities, and are therefore overridden by the public policy inherent in § 1983 to remedy constitutional violations. *See id.*

Implicit in *Owen* and other decisions of the Court extending or limiting immunities from suit under § 1983 is that the question of immunity does not even arise except in those circumstances wherein, absent a privilege, liability would attach. *See Jones v. Marshal, supra*, 528 F.2d at 139; *Restatement (2d) of Torts* § 10 (1965). Thus, a plaintiff often may be limited to

injunctive relief for a constitutional violation, which will be available even though the guilty officials have acted in good faith and, due to a privilege, are not liable in damages. *See Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977).

Therefore, the decision to deny municipalities the qualified immunity of the good faith defense must be viewed in light of the preceding decision in *Monell* that liability against a municipality may be predicated only upon a finding of actual fault by the municipality itself, as represented by officials in policy-making positions. *See Monell v. New York City Dept. of Social Services, supra*, 436 U.S. at 690-94. The Court expressly rejected the doctrine of *respondeat superior–i.e.*, strict liability for the acts of one's employees–as a basis for finding liability against a municipality. *See id.* Similarly, the question of whether to extend an absolute immunity from punitive damages to all governmental entities must be viewed against the background of this fault standard for municipal liability under § 1983. Inasmuch as a municipality can be held liable under § 1983 only upon a showing of fault by the municipality itself, immunity can be extended only in circumstances wherein a constitutional violation has occurred, and the municipality is itself responsible for the deprivation of rights. Hence, a decision to extend absolute immunity from punitive damage awards under § 1983 to municipalities would be in derogation of the public policy inherent in § 1983 to deter future violations of constitutionally protected rights. *See Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1415-17; *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978).

The test for determining whether a particular claimed immunity is implied in § 1983 is a two-pronged one, contemplating

both the prevalence of the immunity at common law, and the compatibility of the public policy served by the privilege with the public policy enforced by § 1983. *See Owen v. City of Independence, Mo., supra,* 100 S. Ct. at 1408-09; *Scheur v. Rhodes, supra,* 416 U.S. at 237-47. Thus, in order to justify the absolute immunity from liability for punitive damages sought by petitioner-municipality herein, in respect to its deprivation of constitutionally protected rights, petitioner must show that the immunity sought was firmly rooted in the common law and that it serves a public policy that justifies the negative impact upon the policies served by 42 U.S.C. § 1983.

## II

## The Historical Immunity Of Municipalities From Punitive Damage Awards Was In A Context Qualitatively Different Than That Which Exists Under *Monell* Liability.

Municipal liability for the acts of its employees and officials has always occupied a unique position in the law of torts. Both the majority and dissenting opinions in *Owen v. City of Independence, Mo., supra,* extensively discussed the state of municipal liability in the mid-Nineteenth Century. Two undisputed principles appear in respect to the extent of municipal liability. First, there was never a rule applying an absolute sovereign immunity to municipal corporations. *See id,* 100 S. Ct. at 1410-13; *Sethy v. Alameda County Water District, supra.* Second, a municipality will, in appropriate circumstances, be liable for the tortious acts of its employees or agents, without the necessity of proof that the municipality itself was culpable

per the *Monell* standard. *See Owen v. City of Independence, Mo., supra,* 100 S. Ct. at 1410-12 (and authorities cited therein).

Petitioner cites several mid-Nineteenth Century cases as authority for its contention that municipal immunity for punitive damage awards was firmly rooted in the common law of the day. While each of the authorities cited do in fact stand for that proposition, each authority also concedes the municipalities' strict liability for negligent torts of its employees, committed within the course and scope of their employment—*i.e.*, liability predicated upon the doctrine of *respondeat superior.* For example, the Alabama Supreme Court, addressing the question as one of first impression, after some discussion of countervailing opinions, stated:

> "Notwithstanding there is some conflict of authority upon the subject, we think the doctrine, that a municipal corporation, in the construction of sewers, acts ministerially, and is responsible for damages caused by the careless and negligent manner in which it discharges that duty, is consistent with reason, demanded by justice, and supported by a preponderance of authority. We therefore adopt it."
>
> *City Council of Montgomery v. Gilmer & Taylor,* 33 Ala. 116, 130, 70 Am. Dec. 562 (1858).

In that court's discussion of potential liability, no distinction was made between the acts of agents of the city and the city itself, as would only be the case under the doctrine of *respondeat superior.* The theory operated under was essentially that a municipal corporation, when acting for the benefit of its members, was little distinguishable from a private corporation. Thus, when a municipal corporation was "performing the same

'proprietary ' functions as any private corporation, [it was deemed] liable for its torts in the same manner and to the same extent as well." *Owen v. City of Independence, Mo., supra,* 100 S. Ct. at 1412. *Accord Chicago v. Langlass,* 52 Ill. 256, 4 Am. Rep. 603 (1869); *McGary v. President and Council of Lafayette,* 12 Rob. 674, 43 Am. Dec. 239 (1846); *Hunt v. Boonville,* 65 Mo. 620, 27 Am. Rep. 299 (1877); *Order of Hermits of St. Augustine v. County of Philadelphia,* 4 Clark 124, Brightly NP 116 (1847); *Herfurth v. Corporation of Washington,* 6 Dist. Col. 288 (1868); *Chicago v. Martini,* 49 Ill. 241, 95 Am. Dec. 590 (1869); *Woodman v. Nuttingham,* 49 N.H. 387, 6 Am. Rep. 528 (1870).

The doctrine of *respondeat superior* has two primary policy justifications for its seemingly harsh rule of strict liability. First, it is a "rule of policy, a deliberate allocation of a risk . . . [to the] employer [who] . . . is better able to absorb them, and to distribute them . . . to the community at large." W. Prosser, *Law of Torts,* 458-59 (4th Ed. 1971). *See Jennings v. Davis,* 476 F.2d 1271, 1274-75 (8th Cir. 1973). This allocation of risk to the public as a whole, through the employer-principal, is deemed preferable to obliging the innocent victim to bear the full costs alone, given the often impecunious condition of the employee-agent who therefore would be largely judgment-proof.

A second policy justification for this rule of strict liability of employers for the acts of employees is "the makeweight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely." W. Prosser, *Law of Torts, supra,* at 459. Prosser is thus referring to the

normative effect of damage awards upon the persons held liable. This rationale holds that future torts can be deterred by forcing the employer-principal to recognize his responsibilities in the operation of his business to properly select, supervise and instruct employee-agents.

The deterrence rationale enunciated by Prosser and cited in *Jennings v. Davis, supra,* is essentially the same justification for the award of punitive damages against a tort-feasor. *See, e.g., Carlson v. Green,* ..... U.S. ..... , 100 S. Ct. 1468, 1473 (1980). In fact, this is the primary justification for the assessment of punitive damages. *See* W. Prosser, *Law of Torts, supra,* at 11-14.

Therefore, in considering the common law immunity of municipalities from awards of punitive damages, and the consequential lack of the deterrent effect, one must also bear in mind whether other types of damage awards are obtainable and, if so, whether they can serve a similar purpose of deterrence. Under the common law scheme portrayed by petitioner, municipalities were not liable for punitive damage awards; however, they were strictly liable for many torts of their agents, thus serving to deter further such torts by making the municipalities responsible for the selection, retention, supervision and instruction of employee-agents. Under *Monell,* municipalities are clearly not strictly liable for the acts of employee-agents. To the contrary, they are liable only for acts committed by persons who, by their positions and authority, are capable of speaking and/or acting on behalf of the municipal entity as a whole. Therefore, the deterrent effect that accrues from implementation of strict liability per *respondeat superior* will be absent in § 1983 enforcement of constitutional protections.

Eliminating municipal liability for punitive damages has some logic when the municipality is accepting *respondeat superior* liability for all of the torts of its agents within the course and scope of employment. *See* W. Prosser, *Law of Torts, supra,* at 12. When the question of whether to bar punitive damage awards for municipalities is in the context of limited liability of the municipality for the acts of its employees–limited to the acts of employees in policy-making positions–the issue presented is qualitatively different.

A rule barring the award of punitive damages against a municipality under § 1983, for constitutional violations by the entity itself, will not merely implement a traditional immunity. Rather, such a rule will create a privilege significantly broader in scope and weaker in normative effect than the common law immunity, which went hand in hand with *respondeat superior* liability. This difference is sufficient to render considerably less significant the historical fact that municipalities were afforded immunity from punitive damage awards. Given the change of context within which the issue of immunity is now arising, the immunity rule being sought by petitioner cannot be said to be "firmly rooted in the common law." Hence, the determinative test for the question raised herein, whether to accord municipalities absolute immunity from punitive damages under § 1983, should be the balance of public interests served by the proposed privilege and the enforcement of constitutional liberties via punitive damage awards.

## III

## Punitive Damage Awards Are A Necessary Tool For

**The Meaningful Enforcement Of Constitutional Rights Through The Remedial Provisions Of 42 U.S.C. § 1983.**

"It is almost axiomatic that the threat of damages has a deterrent effect, [citation omitted] . . . . Punitive damages are 'a particular remedial mechanism available in the federal courts', [citation omitted], and are especially appropriate to redress the violation . . . of a citizen's constitutional rights." *Carlson v. Green, supra,* 100 S. Ct. at 1473. There is a significant logic behind the statements of this Court in *Carlson.* In many circumstances a clear and unexcusable violation of constitutional rights has occurred, but the actual damages are nominal. Under such conditions, there may be no effective means of deterring future such violations. *See id.* at 1473 n. 9.

This problem becomes clear when other potential remedies are considered in the context of factual circumstances that are not at all unusual. In *Rizzo v. Goode,* 423 U.S. 362 (1976), this Court ruled that absent a strong showing of causation between official conduct and a pervasive pattern of employee misconduct, federal courts will abstain from affording injunctive relief that significantly interferes with the management of a local agency. Under the facts of that particular case, plaintiffs had alleged approximately twenty incidents of alleged police misconduct, and based upon that, sought federal injunctive relief imposing judicial supervision over police management functions. The Court overruled the lower federal courts, stating that proof of a mere twenty such incidents was insufficient proof to justify such a sweeping federal intrusion into a local police agency, in derogation of the principles of comity and federalism. *See Sims v. Adams,*

537 F.2d 829, 832 (5th Cir. 1976). Further, the Court reasoned that twenty incidents of police misconduct are probably not at all uncommon in large municipalities, and that that evidence alone was insufficient proof that lack of supervision by police management or city officials is causally connected with any one or more of those incidents, sufficient to meet the causation test under § 1983. *See Rizzo v. Goode, supra,* 423 U.S. at 371; *Santiago v. City of Philadelphia,* 435 F. Supp. 136, 149-53 (E.D.Pa. 1977). This latter causation requirement has been read to require an "affirmative link" between the constitutional deprivations and the alleged acts or omissions of the supervisors against whom liability is sought. *See Rizzo v. Goode, supra,* at 371; *Kite v. Kelley,* 546 F.2d 334, 337 (10th Cir. 1976).

Even when the evidence is in a state strongly favoring federal judicial intervention, the mere "prospect of an injunctive order would [create] little incentive to shun practices of dubious legality." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-18 (1975).

The abstention rule enunciated in *Rizzo* reserves injunctive relief to only those most aggravated cases, wherein sweeping violations have occurred (*see Holland v. Connors,* 491 F.2d 539, 541 [5th Cir. 1974]), or the officials have acted with such manifest bad faith as to convince a federal court that absent judicial intervention the violations will recur unabated. Thus, injunctive relief will be unavailable for those cases involving less drastic violations, and in those cases deterrence necessarily will have to come from damage awards.

When the sole remedy sought is damages, principles of

comity and federalism are less pertinent. *See Sims v. Adams, supra.* This is so because the court is not intruding into the day-to-day management of the affairs of a local governmental entity. Damages afford a more specific remedy, as they can be directed at the express evil sought to be remedied. Conversely, injunctive relief will often entangle the supervising court in many local affairs only tangentially related to the evil that is the basis for intervention, but which are inseparable therefrom.

However, constitutional violations are not always amenable to monetary valuation. For instance, in *Dellums v. Powell,* 566 F.2d 167 (D.C. Cir. 1977), *cert. denied,* 438 U.S. 916, *rehearing denied,* 439 U.S. 886, the Circuit Court of Appeals reversed the damage award of $7500. given by the jury for a finding that defendants had violated plaintiff's First Amendment rights. The court found the amount of damages excessive for a mere loss of First Amendment rights, without a further showing of actual loss. *See id.* at 195-96. Similarly, the Fourth Circuit Court of Appeals, in *Burt v. Abel,* 585 F.2d 613 (4th Cir. 1978), discussed the amount of damages recoverable for a denial of a property right. *See id.* at 615-16. In such cases, there is nevertheless a constitutional tort (*Carey v. Piphus, supra,* 435 U.S. at 266-67), but "in most cases, a plaintiff who suffers only a procedural deprivation will recover no more than nominal damages." *Burt v. Abel, supra,* at 616. An appropriate remedy in such circumstances would be "recovery of punitive damages where the deprivation of procedural due process has been malicious and there is need to deter or punish violations of constitutional rights." *Id.* at 616.

As Prosser noted, in discussing the rule as to the availability of punitive damages in cases wherein there is no proof of actual loss:

> "Since it is precisely in the cases of nominal damages that the policy of providing an incentive for plaintiffs to bring petty outrages into court comes into play, the view very much to be preferred appears to be that of the minority which have held that there is sufficient support for punitive damages."
>
> W. Prosser, *Law of Torts, supra,* at 14.

Prosser was thereby recognizing that the critical threshold necessity of any system of deterrence is the willingness of some party to initiate the first steps in that system. *Carey v. Piphus, supra,* made it very clear that actual loss was not a prerequisite of an actionable constitutional tort under § 1983, and further provided for the liberal allowance of attorneys fees per 42 U.S.C. § 1988 (*i.e.*, assessable against governmental entity). The logical inference from this holding is that punitive damages may be assessed in a proper § 1983 case, whether or not there is proof of actual loss. *See Silver v. Cormier,* 529 F.2d 161, 163-64 (10th Cir. 1976) (and cases cited therein); *Guzman v. Western State Bank of Devils Lake,* 540 F.2d 948, 953 (8th Cir. 1976) (and cases cited therein). However, few people will pursue civil litigation when the prospect of success offers only nominal damages and attorneys fees, but not even a meaningful deterrence of future tortious conduct. Thus, constitutional deprivations resulting in nominal damages will be without a meaningful remedy, until such time as they become so pervasive as to justify the injunctive remedy repudiated in *Rizzo v. Goode, supra.*

This problem becomes severe in those cases wherein the defendant is alleging a defense of qualified immunity on the grounds that his acts were merely the "good faith enforcement

of governmental regulations." *See Milton v. Nelson*, 527 F.2d 1158, 1159-60 (9th Cir. 1976); *Guzman v. Western State Bank of Devils Lake, supra*, 450 F.2d at 951-53. This defense can be successfully asserted even though the government regulation is itself ultimately determined to be unconstitutional. *Milton v. Nelson, supra*, at 1159-60. Thus, if the alleged constitutional violation occurs as a result of the good faith enforcement of unconstitutional government regulations, but the regulations were enacted or retained in patently bad faith by the municipality, punitive damages assessed against the municipality may be the only effective deterrent of future violations. *See Carlson v. Green, supra*, 100 S. Ct. at 1473 n. 9. If the plaintiff has not suffered actual loss, and injunctive relief is unavailable or relatively ineffective (*see Albemarle Paper Co. v. Moody, supra*), no remedy other than punitive damages will succeed in placing a penalty on the malicious conduct of the municipality's policy-making officials.

As this Court noted in *Owen v. City of Independence, Mo., supra*, a critical purpose of § 1983 is the deterrence of future constitutionnal violations. *See Owen v. City of Independence, Mo., supra*, 100 S. Ct. at 1416. To create a rule of absolute immunity from punitive damages for municipalities would be to insulate such municipalities from a critical deterrent against constitutional torts, often in circumstances when no other practical tool is available for that purpose. The result of such a rule would be inconsistent with the policy underlying § 1983. No countervailing policy upholding municipal immunity justifies so extreme a result. Even the dissenting opinion in *Owen, see id.*, at 1419, does not seem to countenance such an extreme result, since the gravamen of the dissent

is that a qualified immunity should be available for municipalities, creating a privilege for *good faith* violations of constitutional protections. In contrast, the liability of a municipality for punitive damages under *Monell v. New York City Dept. of Social Services, supra,* and other decisions relating to the award of punitive damages, *see* discussion *infra,* could only be predicated upon a finding of actual fault and malice by the municipal entity itself. There is little logic in affording a privilege to a defendant who, on the broad spectrum of possibilities, is among the most culpable.

## IV

## Municipal Liability For Punitive Damages Is Appropriate Because It Will Be Limited To Cases In Which The Municipality Will Be At Fault, And Where There Is A Showing Of Malice Or Bad Faith By Policy-making Officials.

In *Rizzo v. Goode, supra,* this Court provided the standard by which a supervisor may be amenable to suit under 42 U.S.C. § 1983 for constitutional violations perpetrated by employees under his supervision. Specifically, the Court postulated, in effect, that there must be an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy . . . –express or otherwise–showing their authorization or approval of such misconduct." *Rizzo v. Goode, supra,* 423 U.S. at 371. Although *Rizzo* involved a claim for injunctive relief, the same causation standard has been generally adopted in cases both preceding and following the *Rizzo* decision.

In *Kite v. Kelley, supra,* the Tenth Circuit ruled that the

" 'affirmative link' requirement . . . means . . . that before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made." *Kite v. Kelley, supra,* 546 F.2d at 337. In *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077 (3d Cir. 1976), the Third Circuit held that, to obtain liability against a supervisor for the acts of an inferior, the plaintiff must show that the supervisor either (a) participated in the act complained of, or (b) had knowledge of the constitutional deprivation and acquiesced in the conduct. *Id.* at 1082. *Accord, Black v. Brown,* 513 F.2d 652, 654 n. 3 (5th Cir. 1975). The Fifth Circuit has also held that a "supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury." *Sims v. Adams, supra,* 537 F.2d at 831. The same court added that a "complaint alleging that a . . . supervisor has notice of past culpable conduct of his subordinates and has failed to prevent a recurrence of such misconduct states a § 1983 claim." *Id.* at 832.

Similarly, the Sixth Circuit has ruled that in the absence of a showing that the supervisor "is somehow personally at fault by actively participating in, encouraging or directing the commission of illegal acts by his subordinates, there can be no recovery against him." *Coffy v. Multi-County Narcotics Bureau,* 600 F.2d 570, 580 (6th Cir. 1979). That Circuit added that to make out an actionable case of "nonfeasance", there must be evidence that the supervisor "was put on notice of an alleged scheme . . . that he should have prevented. *Id.* The Ninth Circuit has held that a supervisor may be deemed liable for a failure to act when there was a clear duty to act,

whether by virtue of statute or regulation. *See Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). *Accord, Davis v. Zahradnick*, 600 F.2d 458, 459 n. 1 (4th Cir. 1979) (neglect of duty to supervise prison guards actionable under § 1983). *See, generally, Santiago v. City of Philadelphia, supra*, 435 F. Supp. at 150-53 (and cases cited therein) (exhaustive discussion of causation requirement).

42 U.S.C. § 1983 requires that the "person" held liable either be a direct participant in the alleged deprivation of rights, or have some other causal relationship with the misconduct–*i.e.*, there must be an affirmative link between the supervisory conduct and the alleged deprivation of rights. Liability of municipalities will also result only after a similar showing of an affirmative link between the acts of "its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" (*see Monell v. New York City Dept. of Social Services, supra*, 436 U.S. at 694) and the acts of alleged misconduct. The Second Circuit, following *Monell*, has ruled that such liability may be founded upon a supervisor's failure to supervise when that failure is so severe as to amount to "gross negligence" or "deliberate indifference". *See Owens v. Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979).

The sum of these decisions is that a municipality will not be held liable absent a clear showing of fault by the municipality, as evidenced by the officials and/or bodies which have the authority to act or speak for the governmental entity on matters of policy or practice. Therefore, the issue of punitive damages vis-a-vis a municipality will arise only in those cases where the plaintiff alleges facts sufficient to bring his cause of action within the fault requirement under *Monell*.

As the Second Circuit noted in *Owens v. Haas, supra,* "this concept of 'deliberate indifference' does not hold the county at fault for the actions of its employees on a *respondeat superior* basis; it holds the county liable for its own actions which result in deprivation of constitutional rights." *Id.* at 1246.

Once a determination is made that a governmental entity is liable to a plaintiff for constitutional violations resulting from its "own actions", punitive damages may be awarded, but only if the plaintiff can meet the burden of proof that is normally required for such damages. Under normal circumstances, a plaintiff will not be able to recover punitive damages. *See Burt v. Abel, supra,* 585 F.2d at 616. However, "punitive damages may also be awarded in civil rights actions where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff. [Citations omitted.]" *Guzman v. Western State Bank of Devils Lake, supra,* 450 F.2d at 953. The Tenth Circuit used similar language in providing the standard for liability for punitive damages, stating that a jury may award punitive damages when a "public official manifests a reckless indifference to the property rights of others, ill will, a desire to injure, or malice." *Silver v. Cormier, supra,* 529 F.2d at 163-64 (and cases cited therein).

Conversely, the Third Circuit held that:

> "A superior police officer may not be subjected to punitive damages because of wrongful acts by a subordinate officer if there is no evidence that the superior officer ordered or personally participated in the acts, or knew or should have known that the acts were taking place

and acquiesced in them. *See Restatement (2d) of Torts* § 909."

*Fisher v. Volz*, 496 F.2d 333, 349 (3d Cir. 1974).

Moreover, even when a jury has properly found the elements prerequisite to an award of punitive damages, a trial or appellate court can modify the award downward if the initial award is excessive. *See Guzman v. Western State Bank of Devils Lake, supra*, at 954 (award reduced by appellate court). Thus, the courts, who will not be as prone as juries might be to make extravagant awards based upon the emotions of the moment, will be able to assure that reasonable and appropriate awards of punitive damages will be made. There is in fact no reason to believe that municipalities will be bankrupted by excessive punitive damage awards. The majority rule has long been to hold private corporations liable for punitive damages for the acts of their agents within the course and scope of their employment. This rule has applied even to those acts not ratified or approved by the corporation–*i.e*, strict liability per *respondeat superior*. W. Prosser, *Law of Torts, supra*, at 12. Prosser added that "this is especially true in the case of corporations, who can only act through their agents." *Id.*

Thus, the award of punitive damages against municipal entities will be limited by the strict application of those rules already in force in respect to such awards against supervisors. Liability for punitive damages will not arise from evidence of "a bare violation of § 1983." *See Addickes v. S. H. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J. concurring in part and dissenting in part). There does not appear to be any significant policy consideration countervailing the public interest in having the Constitution duly

enforced, including by the means of punitive damages, when necessary to implement the policies inherent in § 1983.

## V

## The American Public Has An Interest In The Vigorous Enforcement Of Constitutional Protections That Supersedes The Financial Interests Of Individual Communities And The Political Interests Of Local Officials.

The deterrent policies underlying § 1983 are for the benefit of the entire population whose rights are enforced thereby, not merely for the benefit of the individual plaintiff. This is the essence of the private attorney general doctrine, on which attorneys fees rulings were initially based, and upon which this Court has sought to base many of its expansive interpretations of the various civil rights statutes. *See, generally, Carey v. Piphus, supra; Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). The public clearly has an interest in the proper enforcement of constitutional protections, and when government officials abrogate their sworn duty to uphold the Constitution, they must be brought to task. As noted earlier, "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." *Carlson v. Green, supra,* 100 S. Ct. at 1473 n. 9. In such circumstances, the public has an interest that there be some remedy for those malicious violations to, at minimum, deter future misconduct.

The notion that a municipality and its citizenry are separable legal persons defies logic. First, the acts of the municipality

are not necessarily distinguishable from those of its citizenry. Participatory democracy at the local level is often very high, with legislative enactments often originating or culminating with a vote of the public at large. In some circumstances, such referenda may result in legislation that is in violation of the United States Constitution. *See Reitman v. Mulkey,* 387 U.S. 369 (1967). (Supreme Court held an initiative concerning housing, passed by statewide referendum, to violate the Fourteenth Amendment to the federal Constitution[1]). Further, this country's political system is founded upon republicanism–*i.e.*, the principle that political decisions on behalf of the public are made by elected representatives, who are in turn responsible to the voters for their decisions and conduct.

The public served by enforcement of the Constitution is not the local population wherein the constitutional violations are alleged to be occurring. Rather, the public interest benefited by enforcement via § 1983 is that of the entire nation. Every citizen is deemed to have an interest in the vigorous enforcement of constitutional rights guarantees, whether the malfeasor is an individual acting under color of state law, or a governmental entity acting in the name of a local population. As this Court stated in *United States v. Classic,* 313 U.S. 299 (1941), the purpose of the Civil Rights Act was to protect against the "misuse of power, possessed by virtue of state law and made

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[1] Amici curiae do not suggest by citation of this case that the State of California, which is immune under the doctrine of sovereign immunity, would or should be liable for any damages. Reitman is offered only as significant example of an unconstitutional enactment by a governmental entity wherein the body politic was directly responsible.

possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 326.

If the consequences of a punitive damage award is that public officials responsible therefor are politically held to account for their actions, that fact is at worst irrelevant (*see Zarcone v. Perry*, 572 F.2d 52 [2d Cir. 1978]), and at best a salutary result intended by damage awards in cases of constitutional torts (*see Owen v. City of Independence, Mo.*, *supra*, 100 S. Ct. at 1418-19 & nn. 40, 41). A punitive damage award can only arise upon a finding that the party so assessed committed a malicious violation of constitutional rights, in derogation of the official's sworn duty to uphold and defend the Constitution. Unlike the issues presented in *Owen v. City of Independence, Mo.* and other cases defining the extent of the good faith immunity of public officials, the issue in this case is the liability for malicious, knowing acts of misconduct. Sympathy for the perpetrators of the acts is surely misplaced.

Petitioner's concern for the political future of the local officials deemed responsible for the violations of plaintiff's constitutional rights, as determined by a jury following trial, only underlines the effectiveness of the deterrent force of punitive damage awards against both the municipality and the individuals. It is only fitting that these individuals should now find themselves compelled to answer to the local body politic for their failure to properly carry out their duties of office. To grant the absolute privilege sought by petitioner would only assist the malfeasant officials in shielding their tortious conduct from public view, with the attendant possibility that their misconduct will be repeated.

Applying liability for punitive damages to municipalities

will compel municipal officials to duly consider the impact of their actions, particularly malicious constitutional torts, on the public treasury, for they will fear being held politically or personally responsible for the consequences. This is as it should be. *See Owen v. City of Independence, Mo., supra,* 100 S. Ct. at 1418 7 n. 41; *Simineo v. School Dist. No. 16, Park City, Wyo.,* 594 F.2d 1353, 1357 (10th Cir. 1979) (punitive damages allowable against municipality); *Fulton Market Cold Storage v. Cullerton,* 582 F.2d 1071, 1073 (7th Cir. 1978) (punitive damages allowable against municipality); *Bradshaw v. Zoological Society of San Diego,* 569 F.2d 1066, 1068 (9th Cir. 1978) (punitive damages allowable against municipality). As Prosser stated, in relating the essential rationale for awarding punitive damages: "If such damages will encourage employers to exercise closer control over their servants for the prevention of outrageous torts, that is sufficient ground for awarding them." W. Prosser, *Law of Torts, supra,* at 12.

## CONCLUSION

This Court in *Monell* deemed municipalities to be persons under 42 U.S.C. § 1983, and based upon that statutory construction, limited municipal liability to circumstances in which the municipality itself is culpable in the same sense that fault must be proved against any natural person. Inasmuch as municipal liability has been limited to fault situations, municipalities should have coextensive liability with all natural persons found liable under the terms of § 1983. Therefore, municipalities should be liable for punitive damages to the same extent as natural persons–*i.e.*, when the elements of malice or bad faith

can be directly attributed to officials or governmental bodies in whose name *Monell* liability can be attributed to the municipality.

Respectfully submitted,

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## PROOF OF SERVICE BY MAIL
## Rule 28(c)

STATE OF CALIFORNIA )
) ss.
County of Orange )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding;

My address and place of doing business is 326½ Main Street, Huntington Beach, California 92648, that on FEBRUARY 27, 1981, I served the within BRIEF OF ACLU FOUNDATION, SOUTHERN CALIFORNIA AND AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILATE AS AMICI CURIAE (No. 80-396) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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Providence, Rhode Island 02903
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Attorney for Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Executed on FEBRUARY 27, 1981, at HUNTINGTON BEACH, CALIFORNIA.

_____

D. A. Standefer

**The affidavit of Fred Okrand, an attorney at law admitted to practice before the Supreme Court of the United States, will be forwarded with reference to the mailing of the original and 40 copies of the within Brief of Amici Curiae to the Supreme Court Clerk.**

**Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648**
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MOTION FILED
JAN 30 1981

# In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-396

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity
as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All Individually and in Their Official Capacity
as Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, WITH BRIEF ANNEXED.

James J. Clancy
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Council for Amicus Curiae

SUBJECT INDEX

Brief Amicus Curiae

STATEMENT OF THE CASE ..... 9

(A) The Execution Of The Contract..... 9

(B) The Contract Provisions In Dispute..... 10

(C) The Nature Of The Dispute Which Arose In The Execution Of The Contract..... 11

(D) The Litigation In The State Court System..... 14

(E) The Litigation In The Federal Court System..... 14

ARGUMENT..... 19

THE FEDERAL JUDGMENT AGAINST THE CITY OF NEWPORT FOR PUNITIVE DAMAGES IN THE CIVIL RIGHTS ACTION (42 U.S.C. SECTION 1983) MUST BE REVERSED FOR LACK OF JURISDICTION IN THE FEDERAL DISTRICT COURT TO HEAR THE MATTER..... 19

(A) Facts Concerts Inc., Has Failed To State A Claim Upon Which Federal Jurisdiction Can Be Based..... 19

(B) The Public Policy Expressed In Owen v. City Of Independence, Mo., Precludes An Award Of Punitive Damages Against Local Public Entities Under 42 U.S.C. Section 1983..... 24

(C) Under Board Of Regents Of The University Of New York v. Tomanio And 42 U.S.C., §1988, This Court May Not Disregard The Law In Those States Which Prohibits An Award Of Punitive Damages Against A Public Entity..... 26

(C)(1) To Permit A Federal Court To Award Punitive Damages Against A Municipality In The Execution Of Its Governmental Contracts, In Those States Where State Law Specifically Prohibits Punitive Damages Generally, Would Violate The Basic Principles Of State Sovereignty Which Are Embodied In The Eleventh Amendment To The Federal Constitution..... 27

CONCLUSION..... 30

TABLE OF AUTHORITIES

CONSTITUTION, STATUTES, CODES, AND RULES

Allen v. McCurry et al., ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___ (Dec. 9, 1980)..... 4, 5, 6, 19, 21, 22, 23

Board of Regents of The University of New York et al. v. Tomanio, ___ U.S. ___, 64 L.Ed.2d 440, 100 S.Ct. ___ (May 19, 1980)..... 23, 26

Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614..... 28

Facts Concerts Inc., et al. v. City of Newport, 626 F.2d 1060 (June 17, 1980)Hans v. Louisiana, 134 U.S. 1, 33 L.Ed.2d 42, 10 S.Ct. 504..... 3, 4, 5, 6, 7

Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (March 18, 1975)..... 2, 3, 4, 5

Hans v. Louisiana, 134 U.S. 1, 43 L.Ed.2d 42, 10 S.Ct. 504..... 27

Judice v. Vail, 430 U.S. 327, 51 L.Ed.2d 376, 97 S.Ct. 1211 (Mar. 22, 1977)..... 3, 5

Martinez v. California, ___ U.S. ___, 62 L.Ed.2d 481, 100 S.Ct. ___ (Jan. 15, 1980)..... 7, 4, 19, 20

Mitchell Brothers' Santa Ana Theater; Cinema 7, Inc., a California corporation vs. City Council of the City of Santa Ana; David L. Brandt; Gordon Bricken;

Mitchell Brothers' Santa Ana Theater; Cinema 7, Inc., a California corporation vs. City Council of the City of Santa Ana; David L. Brandt; Gordon Bricken; Vernon S. Evans; John Garthe; David F. Ortiz; James E. Ward; Harry Yamamoto; Keith L. Gow and James J. Clancy, Civil No. 80-959-FW..... 2

Monell v. New York City Department of Social Services, 436 U.S. 695, 56 L.Ed.2d 611, 98 S.Ct. 2018..... 8

Moore v. Sims, 442 U.S. 415, 60 L.Ed.2d 994, 99 S.Ct. 2371 (June 11, 1979)..... 4, 5

Owen v. City of Independence, Mo., ___ U.S. ___, 63 L.Ed.2d 673, 100 S.Ct. ____ (April 16, 1980)..... 8, 20, 21, 24

Parden v. Terminal, R.Co., 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207..... 28

Rosener v. Sears Roebuck and Co., 110 Cal.App.3d 740, 168 Cal.Rptr. 237..... 29

Snepp v. U.S., 595 F.2d 926..... 29

Snepp v. U.S., ___ U.S. ___, 62 L.Ed.2d 704, 100 S.Ct. ____ (Feb. 19, 1980)..... 29

Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546,..... 23

State of Nevada v. Hall, 440 U.S. 410, 59 L.Ed.2d 416, 99 S.Ct. 1182 (March 5, 1979)..... 28

The City of Newport et al. v. Fact Concerts, Inc., et al..... 3

Trainor v. Hernandez, 431 U.S. 434, 52 L.Ed.2d 486, 97 S.Ct. 1911 (May 31, 1977)..... 4, 5

Vance et al., v. Universal Amusement Co., Inc., October Term, 1979 No. 78-1588..... 2

42 U.S.C. section 1983.... 7, 14, 19, 20, 21, 26

California Government Code Section 818..... 2

F.R.C.P., Rule 12(f)..... 2

# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

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THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
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as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
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All Individually and in Their Official Capacity
as Members of the City Council for the
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FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

---

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, THE CITY OF NEWPORT ET AL.

James J. Clancy, (hereafter referred to as Moving Party) respectfully moves, pursuant to Rule 36 of the Rules of the Supreme Court of the

United States, for leave to file a brief as amicus curiae in support of the Petitioners herein. The consent of the parties was requested by letter dated January 27, 1981.

Amicus Curiae has a special interest in the subject of this appeal, being special counsel for the City of Santa Ana in four (4) civil public nuisance abatement lawsuits in the California State Court, and a defendant in a Civil Rights Action against the City Council of the City of Santa Ana and others, filed in the United States District Court, Central District of California on March 12, 1980, alleging constitutional torts incident to such State Court civil abatement proceedings. A motion to dismiss for failure to state a claim on which relief could be based, F.R.C.P. 12(b), and a motion to strike the claim for punitive damages pursuant to F.R.C.P. 12(f), on the ground that the statutes of the State of California do not permit punitive damages against a public entity, see California Government Code section 818, is

presently pending in the U.S. District Court.

Moving party contends that the judgment awarding punitive damages in The City of Newport et al. v. Fact Concerts, Inc., et al., should be reversed for reasons other than those being urged in the brief of the petitioners; namely, for lack of jurisdiction in the U.S. District Court, and for failure to state a claim upon which federal relief can be granted.

In a lawsuit such as Fact Concerts, Inc. v. The City of Newport, et al., where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the federal constitutional issue is "pendent" to the main contract claim, and (2) such federal constitutional claim may be asserted affirmatively either as a remedy in the contract action in the State Court or joined as an independent cause of action in such state court action, it would seem that the constitutional rule must evolve that the party must first assert the federal claim in the contract action

in the state court. Dismissal of such action is warranted either on the ground that a federal court does not have "jurisdiction" to hear such a separate civil rights action until such federal claim has been rejected in the state court system, Allen et al. v. McCurry, supra, or the plaintiff has failed to plead the necessary facts to state a cause of action upon which relief can be based. Martinez v. California, supra.

Unless the judgment in Fact Concerts Inc., et al. v. The City of Newport et al., 626 F.2d 1060 (June 17, 1980) is reversed on jurisdictional grounds, any party to a contract with a municipality who "claims" a constitutional tort in the execution of the contract will be able to enter the federal system under a 42 U.S.C. section 1983 claim and litigate such contract claim in the federal system. The fact that the City of Newport did not raise the "jurisdictional" issue in the trial court should not be allowed to establish a

precedent and create federal jurisdiction where it does not properly exist.[1]

DATED: January 29, 1981

Respectfully Submitted,

James J. Clancy
Counsel for Amicus Curiae

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[1] The City of Newport did, however, move to dismiss for failure to state a claim upon which relief could be based. See Fact Concerts Inc. v. City of Newport, 626 F.2d 1060 at 1063.

# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

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THE CITY OF NEWPORT,
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FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

---

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONERS

---

INTEREST OF AMICUS CURIAE

Amicus Curiae has a special interest in the subject of this appeal, being special counsel for the City of Santa Ana in four (4) civil public nuisance abatement lawsuits in the California State Court, and a defendant in a Civil Rights Action against the City Council of the City of Santa Ana and others, filed in the United States District Court, Central District of California on March 12, 1980, alleging constitutional torts incident to such State Court civil abatement proceedings.[1] A motion to strike the claim for punitive damages pursuant to F.R.C.P. 12(f) is presently pending in the U.S. District Court on the ground that the statutes of the State of California do not

[1] The Civil Rights Action is entitled Mitchell Brothers' Santa Ana Theater; Cinema 7, Inc, a California corporation vs. City Council of the City of Santa Ana; David L. Brandt; Gordon Bricken; Vernon S. Evans; John Garthe; David F. Ortiz; James E. Ward; Harry Yamamoto; Keith L. Gow and James J. Clancy, Civil No. 80-959 FW. See, also, Amicus Curiae Brief of the City of Santa Ana, California, in Support of Petition for Rehearing in Vance et al., v. Universal Amusement Co., Inc., October Term, 1979 No. 78-1588 at page 8, footnotes 4 and page 15 footnote 6.

permit punitive damages against a public entity. See California Government Code section 818.

Amicus Curiae was also the attorney of record in the Ohio Public Nuisance Abatement case, Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (March 18, 1975) in which it was argued on appeal that the U.S. District Court lacked jurisdiction and was required to dismiss the Civil Rights Action. This Court's decision in Huffman v. Pursue, Ltd., supra, remanding the case to the U.S. District Court:

> ". . . so that the District Court may consider whether irreparable injury can be shown in light of 'Without a Stitch,' and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind." (Our emphasis)

was further applied in Judice v. Vail, 430 U.S. 327, 51 L.Ed.2d 376, 97 S.Ct. 1211 (Mar. 22, 1977). In his dissent in Judice, Justice Stewart significantly noted as to what is required under Huffman v. Pursue Ltd., supra:

> "Both types of 'abstention' of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and functions. But there is a significant difference in result between the two. Under Pullman abstention, the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under Younger it may not." (Our emphasis.)

see also Trainor v. Hernandez, 431 U.S. 434, 445, 52 L.Ed.2d 486, 493, 97 S.Ct. 1911 (May 31, 1977)[2] and Moore v. Sims, 442 U.S. 415, 430, 60 L.Ed.2d 994. 1007, 99 S.Ct. 2371 (June 11, 1979), citing the Trainer v. Hernandez text

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[2] In Trainor v. Hernandez, supra, this Court held that where Huffman v. Pursue Ltd. applies, the Court should dismiss the case:

> "For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state

noted above, in holding that the principles of Younger-Huffman acted as a bar.

While the language of the U.S. Supreme Court in Huffman v. Pursue, Ltd., supra, Judice v. Vail, supra, Trainer v. Hernandez, supra, and Moore v. Sims, supra, does not specifically hold that federal "jurisdiction" is in question, that appears to be the necessary result under the rationale expressed in Allen v. McCurry, supra, where the trial court facts show that the constitutional claim can be raised and fully

footnote 2 continued:

> officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent. This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which Younger and Samuels v. Mackell primarily rest apply in full force here. The pendency of the state court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extradordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim." (Our emphasis.)

litigated in a Civil Action in the state court.

It would seem, therefore, that the constitutional rule must evolve that, in a lawsuit such as Fact Concerts, Inc. v. The City of Newport, et al., where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the federal constitutional issue is "pendent" to the main contract claim, and (2) such federal constitutional claim may be asserted affirmatively either as a remedy in the contract action in the State Court or joined as an independent cause of action in such state court action, the party must first assert the federal claim in the contract action in the state court. Dismissal of such action can be justified either on the ground that a federal court does not have "jurisdiction" to hear such a separate civil rights action until such federal claim has been rejected in the state court system, Allen et al. v. McCurry, supra, or the plaintiff has failed to plead the necessary facts to state a cause of

action upon which relief can be based. Martinez v. California, supra.

Unless the judgment in Fact Concerts Inc., et al. v. The City of Newport et al., 626 F.2d 1060 (June 17, 1980) is reversed on jurisdictional grounds, any party to a contract with a municipality who "claims" a constitutional tort in the execution of the contract will be able to enter the federal system under a 42 U.S.C. section 1983 claim and litigate such contract claim in the federal system. The fact that the City of Newport did not raise the "jurisdictional" issue in the trial court should not be allowed to establish a precedent and create federal jurisdiction where it does not properly exist.[3]

More importantly to the Amicus Curiae and the City of Santa Ana (which has been in litigation in the state court system for more

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[3] The City of Newport did, however, move to dismiss for failure to state a claim upon which relief could be based. See Fact Concerts Inc. v. City of Newport, 626 F.2d 1060 at 1063.

than four years on four state civil public nuisance abatement actions in which it has expended more than $190,000.00) this Court should place both (a) jurisdictional, and (b) financial limitations on the newly created liability of Cities established by this Court in Monell v. New York City Department of Social Services, 436 U.S. at 695, 56 L.Ed.2d 611, 98 S.Ct. 2018 and Owen v. City of Independence, Mo., ___ U.S. ___, 63 L.Ed.2d 673, 100 S.Ct. ____ (April 16, 1980). Broadly speaking, this Court should require federal claims, which are "pendent" to state court matters, be raised in the civil action in the state court. Under the present state of the economy, an "average" municipality cannot afford a staff of attorneys to litigate governmental claims in the federal system at the same time they are being litigated in the state court system. In no event, should punitive damages be awarded. Amicus Curiae submits that unless remedied, the natural consequence of this extension of federal

jurisdiction will be governmental paralysis.

## STATEMENT OF THE CASE

### (A) The Execution Of The Contract.[4]

In the early summer of 1975, Plaintiff Fact Concerts, Inc. (Fact Concerts) through its President Frank Amado (Amado) and Plaintiff Marvin Lerman (Lerman) discussed holding a two-day jazz festival in the City of Newport. Amado had previously obtained a lease from the Rhode Island Department of Natural Resources to hold three concerts in Fort Adams, a large, state-owned facility located in Newport, Rhode Island and then sought licenses from the City of Newport. Amado obtained a license from the City of Newport and successfully staged a first concert featuring Arthur Fiedler. Amado had also applied for, in May, 1975, and been granted a license by the City Council for two jazz concerts to be given at Fort Adams on August 2nd and 3rd. Subsequently, the Plaintiffs

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[4] See Statement of the Case in Brief in Opposition to the Petition for a Writ of Certiorari at page 2.

successfully sought a substitution of August 30 and 31 from the Council, which granted a license through a contract dated August 22, 1975 and duly authorized it by vote.

(B) The Contract Provisions In Dispute.

Plaintiff Fact Concerts contends[5] that the contract did not grant the City the right to approve performers who would appear, nor did it designate the type of music to be played, referring only to a "music concert" and acknowledges the city retained the right to cancel only "if the interests of public safety demand."

In cancelling the contract, the City of Newport contended[6] that it was justified in relying upon paragraph 2 and paragraph 7 of the contract. The contract provided in paragraph 2 that:

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5 See Statement of the Case in Brief in Opposition to the Petition for a Writ of Certiorari at page 2.

6 See Statement of Facts in Petition for a Writ of Certiorari at page 3.

"It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interest of the public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation."

In Paragraph 7 it further provided:

"The Producer agrees to comply with all orders of the Director of Public Safety with reference to fire and police protection and safety including, but not limited to, the following:

(a) Auxiliary generator for lighting;
(b) Firefighters for fire protection and First Aid duties;
(c) Portable firefighting equipment, state area;
(d) Seating to be arranged so that aisles point near exits off the field as well as possible - all chairs to be wired together. Exits and entrances shall be provided as directed;
(e) All seats to be installed and ready for occupancy no later than 3:00 P.M. on August 29, 1975."

(C) The Nature Of The Dispute Which Arose In The Execution Of The Contract.

Plaintiffs began in the summer of 1975 to book top jazz acts. However, one attraction, Sarah Vaughan, was unavailable, and Plaintiffs substituted an alternative group called Blood,

Sweat and Tears. This group triggered the events at the heart of the case. Plaintiffs considered Blood, Sweat and Tears a jazz group equivalent in stature to Sarah Vaughan, based upon the group's appearance in Carnegie Hall, representing the United States on State Department-sponsored jazz tours, and appearing at major jazz festivals. Plaintiffs advertised the jazz concerts, including an August 24, 1975 ad in the New York Times, announcing the addition of Blood, Sweat and Tears.[7]

On the Monday before the concerts, August 24, 1975, Amando received notice of a problem. He called Mayor Donnelly, who talked about cancellation of Blood, Sweat and Tears because he did not want any rock groups appearing in Newport. The next day Fact Concerts officials attended a special City Council meeting. The Fact Concerts group was told that Blood, Sweat and Tears would have to be removed or the

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[7] See Statement of the Case in Brief in Opposition to the Petition for writ of certiorari at page 2.

license would be revoked. The Mayor said that Blood, Sweat and Tears would bring a long-haired element that the City did not want. A Fact Concerts spokesman explained that Blood, Sweat and Tears was a jazz group, but this information was rejected.

After further meetings on August 28th and August 29th, the City Council acted on the matter. A motion was made, seconded and approved unanimously to cancel the contract. All of the councilmen who later testified, indicated that they were concerned because of earlier disturbances (in 1960, 1969 and 1971) at so-called rock concerts and that it was this concern that prompted the vote to cancel.

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[8] See Statement of the Case in Brief in Opposition to the Petition for Writ of Certiorari at page 3.

[9] See Statement of Facts in Petition For a Writ of Certiorari at page 5.

(D) The Litigation In The State Court System.[10]

The next day, Saturday, August 30th, the plaintiffs obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned including the appearance of Blood, Sweat and Tears on Sunday, August 31st. Approximately 6400 people attended the two-day event.

(E) The Litigation In The Federal Court System.[10]

Thereafter Fact Concerts, Inc. and Marvin Lerman (one of the promoters) brought a five count complaint in the United States District Court for the District of Rhode Island seeking declaratory relief, redress for a violation of their First Amendment rights, and compensatory and punitive damages for various pendent contract claims.

At trial the complaint was reduced to two

---

[10] The sole ground for federal jurisdiction is 42 U.S.C. Section 1983. If the plaintiffs have failed to state a claim under 42 U.S.C. § 1983, the lawsuit must be dismissed.

counts, the first a Section 1983 claim[11] and the second a claim for interference with contractual relationships.

The jury answered interrogatories finding all defendants liable on both counts and awarding $72,000.00 compensatory damages and punitive damages in the total amount of $275,000.00 of which $200,000.00 was assessed against the City of Newport.

A Motion for Judgment N.O.V. and a New Trial was filed and after hearing thereon the trial justice ordered a remittitur of $125,000.00 of the punitive damages award against Newport and sustained the verdicts in all other respects.

The United States Court of Appeals for the First Circuit affirmed.

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11 See Statement of Facts in Petition for Writ of Certiorari at page 6.

## SUMMARY OF ARGUMENT

The federal judgment against the City of Newport for punitive damages must be reversed for lack of jurisdiction in the federal district court to hear the main contract claim, and for failure of the plaintiffs to state a claim upon which federal relief can be based.

Where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the constitutional issue is "subordinate" and "pendent" to the main contract claim, and (2) the state court appears to be ready and willing to undertake full litigation of the contract claim and the "pendent" constitutional claim, and has already granted partial relief, a cause of action under 42 U.S.C. section 1983 cannot be stated upon which federal jurisdiction can be based. Martinez v. California; Allen v. McCurry et al.

It was never intended that the federal courts should have jurisdiction where the state courts stand ready and willing and are available

"to allow full litigation of a constitutional claim" Allen et al. v. McCurry.

It can no longer be claimed that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court. It clearly was not the intention of Congress in 1871 to establish concurrent jurisdiction in the federal court over all municipal contracts wherein one of the contracting parties claims a constitutional tort in the execution of that governmental contract. Allen et al. v. McCurry.

Fact Concerts Inc. cannot rely upon Southeastern Promotion Ltd. v. Conrad, which is distinguishable. Southeastern Promotion Ltd, was a "prior restraint" case in which the plaintiffs were denied a license and the opportunity to perform. Here, "Blood Sweat and Tears" was granted the license and did perform. The only "live" dispute was as to the rights of the respective parties under the municipal contract.

The public policy expressed in Owen v. City

of Independence, Missouri precludes an award of punitive damages against local public entities under 42 U.S.C. section 1983.

A federal court may not disregard the public policy in States like California which prohibit an award of punitive damages against a public entity. Board of Regents of the University of New York v. Tomanio; Eleventh Amendment.

A federal court may not disregard the public policy of those states which generally prohibit an award of punitive damages. Eleventh Amendment; Hans v. Louisiana; Parden v. Terminal R. Co.; Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare.

Unless the judgment in Fact Concerts Inc., et al. v. The City of Newport et al., 626 F.2d 1060 (June 17, 1980) is reversed on jurisdictional grounds, any party to a contract with a municipality who "claims" a constitutional tort in the execution of the

contract will be able to enter the federal system under a 42 U.S.C. section 1983 claim and litigate such contract claim in the federal system. A federal trial court should not be allowed to "create" federal jurisdiction where it does not properly exist.

## ARGUMENT

### THE FEDERAL JUDGMENT AGAINST THE CITY OF NEWPORT FOR PUNITIVE DAMAGES IN THE CIVIL RIGHTS ACTION (42 U.S.C. SECTION 1983) MUST BE REVERSED FOR LACK OF JURISDICTION IN THE FEDERAL DISTRICT COURT TO HEAR THE MATTER.

(A) Fact Concerts Inc., Has Failed To State A Claim Upon Which Federal Jurisdiction Can Be Based.

Where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the constitutional issue is "pendent" to the main contract claim, and (2) the state court appears to be ready and willing to undertake full litigation of the contract claim and the "pendent" constitutional claim, and has already granted partial relief, a cause of action under 42 U.S.C. § 1983 cannot be stated upon which federal jurisdiction can be based. Under Martinez v. California, ___ U.S. ___, 62 L.Ed.2d 481, 100 S.Ct. ____ (Jan. 15, 1980) and Allen v. McCurry et al., ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ____ C.C.H., U.S. Supreme Court Bulletin at pages B 395 - B 422. (December 9, 1980), the federal complaint should

have been dismissed for failure to state a claim upon which relief can be based.

In Martinez v. California, (supra), this Court held that, under the specific facts pleaded, the survivors of a parolee's murder victim had not stated a cause of action against officials, where a state statute immunized parole officials from injuries resulting from parole decisions. Under Martinez v. California, supra, the U.S. District Court has the power and duty to decide whether or not, under the specific facts alleged, the plaintiffs have stated a cause of action under 42 U.S.C. § 1983. See Martinez v. California, supra, at 481:

> ". . . we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment.
>
> ". . . We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decendent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim

> has been described as 'a species of tort liability,' Imbler v. Pachtman, 424 U.S. 409, 417, 47 L.Ed.2d 128, 96 S.Ct. 984, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." (Our emphasis.)

In Allen et al. v. McCurry, supra, a majority of this Court had occasion to rethink the legislative intent and rationale which authorized federal jurisdiction in Civil Rights cases, (42 U.S.C. section 1983). In that decision, the majority made it clear that, except where the claim was made that a state statute was unconstitutional on its face, it was never intended that the federal courts should have jurisdiction where the state courts stand ready and willing and were available (as here) "to allow full litigation of the constitutional claim," See Allen et al. v. McCurry, supra, at page B406-407:

> "To the extend that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in Monroe v. Pape, supra, the Court inferred that

> Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176." (Our emphasis.)

In other words, it can no longer be claimed that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, at page B409-410:

> "The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself."

Amicus contends that under the rational expressed by this Court in Allen et al. v.

McCurry, supra, it clearly was not the intention of Congress in 1871 to establish concurrent jurisdiction in the federal court over all municipal contracts wherein one of the contracting parties claims a constitutional tort in the execution of that governmental contract. Particularly is that so, in this case, where the state court has shown a willingness to protect federal rights. Fact Concerts, Inc. made use of the State judicial system on Aug. 30th and obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned. There is no reason to believe the state judiciary would not give Fact Concerts, Inc. a full and fair opportunity to litigate the federal claim in a state court action regarding any breach of contract.

Fact Concerts, Inc. cannot rely upon Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, which is distinguishable. Southeastern Promotions, Ltd., supra, was a "prior restraint" case in which the plaintiffs

were denied a license and the opportunity to perform. Here, "Blood, Sweat and Tears" was granted the licence and did perform. The only "real" dispute was as to the rights of the respective parties under the municipal contract.

(B) The Public Policy Expressed In Owen v. City Of Independence, Mo., Precludes An Award Of Punitive Damages Against Local Public Entities Under 42 U.S.C. Section 1983.

The decision of this Court in Owen v. City of Independence, Mo., ___ U.S. ___, 63 L.Ed.2d 673, 100 S.Ct. ____ (April 16, 1980) which radically revised the rule of law re liability accruing as a result of governmental action, precludes the granting of an award of punitive damages against municipalities under 42 U.S.C. § 1983. In summarizing its holding in the concluding paragraph of the majority opinion in Owen, the Court noted that there are three "principals" in the scenario of the § 1983 cause of action:

(1) the victim of the constitutional deprivation;
(2) the officer whose conduct caused the injury; and
(3) the public, as represented by the municipal entity.

In considering what damages under a § 1983 cause of action may be recovered by the victim, and what damages are appropriately chargeable to the populace as a whole, as represented by the municipal entity, the court, at page 697, limited the victim's recovery to compensatory damages, and expressly stated that the public would be forced to bear only the costs of the injury inflicted:

> "We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy'. Monell v. New York City Dept., of Social Services,

436 U.S., at 695, 56 L.Ed.2d 611, 98 S.Ct. 2018." (Our emphasis.)

(C) Under Board Of Regents Of The University Of New York v. Tomanio And 42 U.S.C., § 1988, This Court May Not Disregard The Law In Those States Which Prohibits An Award Of Punitive Damages Against A Public Entity.

Representative of the law in several states, California Government Code section 818 provides:

> "§ 818. Absence of liability for exemplary and punitive damages. Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

In Board of Regents of the University of the State of New York et al., v. Tomanio, ___ U.S. ___, 64 L.Ed.2d 440, 100 S.Ct. ___ (May 19, 1980) this Court construed 42 U.S.C. § 1988 as requiring the application of state law where federal law provides no rule of decision for actions brought under 42 U.S.C. § 1983, unless they are "inconsistent" with federal law; at page 447:

"In § 1988, Congress 'quite clearly

> instructs (federal courts) to refer to state statutes' when federal law provides no rule of decision for actions brought under § 1983. Robertson v. Wegmann, 436 U.S. 584 (1978). See also Carlson v. Green, ___ U.S. ___, ___, ___, at n. 10 (1980). As we held in Robertson, by its terms, § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and the laws of the United States.'" (Our emphasis.)

Policies of "federalism" are advanced when the federal government recognizes the sovereign rights of a state and a state governmental policy which denies punitive damages in such circumstances.

(C)(1) To Permit A Federal Court To Award Punitive Damages Against A Municipality In The Execution Of Its Governmental Contracts, In Those States Where State Law Specifically Prohibits Punitive Damages Generally, Would Violate The Basic Principles Of State Sovereignty Which Are Embodied In The Eleventh Amendment To The Federal Constitution.

Under the doctrine of sovereign immunity, the U.S. District Court has no jurisdiction over a suit in law or equity by a citizen against the sovereign power of an unconsenting State. Hans v. Louisiana, 134 U.S. 1, 33 L.Ed.2d 42, 10

S.Ct. 504, Parden v. Terminal, R.Co, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207; Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614. For the same reason, an award of punitive damages against a governmental subdivision of the State in the execution of its governmental contracts which conflicts with the State's public policy re punitive damages would violate those same principles of state sovereignty. Compare State of Nevada v. Hall, 440 U.S. 410, 59 L.Ed.2d 416, 99 S.Ct. 1182 (March 5, 1979), where this Court held in a conflict of laws situation, that the Eleventh Amendment does not require that the sovereign immunity expressed in Nevada law be applied by the State of California in a tort action arising out of an automobile accident occuring in the State of California.

It should be noted that six states (Connecticut, Massachusetts, New Hampshire, Colorado, Louisiana, and Washington) do not

permit an award of punitive damages in civil cases. Rosener v. Sears Roebuck and Co., 110 Cal.App.3d 740, 168 Cal.Rptr. 237 at 251. See, also, the federal problem regarding punitive damages expressed in the dissent of Justice Hoffman in Snepp v. U.S., 595 F.2d 926 at 939 et seq.; reversed in Snepp v. U.S., ___ U.S. ___, 62 L.Ed.2d 704, 100 S.Ct. ____ (Feb. 19, 1980).

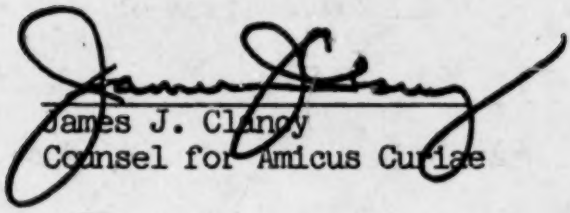
## CONCLUSION

Plaintiffs have failed to plead or prove a constitutional claim upon which independent federal relief can be based. The alleged constitutional deprivation was "subordinate" and "pendent" to the contract claim and should have been presented to the Rhode Island State Court, which had jurisdiction of the contract claim.

For all of the foregoing reasons, the judgment of the court below should be reversed and the cause remanded with instructions that the case be dismissed.

DATED: January 29, 1981

Respectfully Submitted,



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Counsel for Amicus Curiae

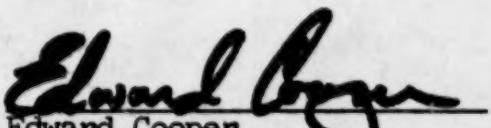
Endorsement of Sponsorship

by the City Attorney

of Santa Ana, California

Pursuant to Rule 36(4) of the Rules of the Supreme Court of the United States, I adopt the within amicus curiae brief as an amicus curiae brief of the City of Santa Ana, California, and sponsor the same as the authorized law officer thereof.

DATED: January 29, 1981



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CERTIFICATE OF SERVICE

I, hereby certify that on this 29th day of January 1981, the original and 40 copies of the within Amicus Curiae Brief were deposited in the United States Post Office in Sun Valley, California, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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MAR 11 1981

No. 80-396

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

The CITY OF NEWPORT, Rhode Island, *et al.*,
*Petitioners,*

v.

FACT CONCERTS, INC., *et al.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITIONERS, CITY OF NEWPORT, *ET AL.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

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The National Institute of Municipal Law Officers (NIMLO) respectfully moves the Court for leave to file the attached brief as amicus curiae in support of the petitioners. The interest of NIMLO in the subject matter of the case is set out in the brief. Petitioners' letter consenting to the filing of this brief has been lodged with the Clerk of this Court; respondents have withheld their consent.

Under the plain language of Rule 36.2, this brief is timely filed in support of the reply brief of the petitioners at the time that reply brief is due. This motion and brief are being filed within that time.

If, on the other hand, an amicus brief in support of a petitioner is timely only at the time of the petitioner's principal brief, NIMLO

moves for leave to file the enclosed brief out of time (and, correspondingly, moves for leave to make the motion beyond the time set by Rule 29.2).

A principal part of the attached amicus brief is the result to date of a survey by NIMLO of its member municipalities of the impact of claims, in part under the Civil Rights Act, 42 U.S.C. §1983, generally, and, specifically, of claims for punitive damages under that section. This survey is still not completed. However the results received to date from 169 local governments, showing claims of $4 billion for damages generally, and claims against 32 governments for over $1 billion in punitive damages, illustrate the gravity of the issue in this case, and the interference with government operations if the judgment of the Court of Appeals is affirmed.

We feel that this material, which is a matter of public record, but which is not otherwise available to the Court in its collected form, will be of assistance to the Court, in light of the part played in recent cases such as *Owen v. City of Independence,* 445 U.S. 622 (1980), by speculation on the answers to the questions answered in part by this survey.

WHEREFORE, if leave to file out of time is required, the National Institute of Municipal Law Officers respectfully moves for leave to move out of time, and moves for leave to file the attached brief as amicus curiae.

Respectfully submitted,

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## TABLE OF CONTENTS


*Page*

Interest of the amicus curiae ..... 1

Statement of the case ..... 2

Summary of argument ..... 4

Argument ..... 4

I. The availability of punitive damages against governments was not contemplated by the Congress in 1871, and these damages today do not further the purposes of the Civil Rights Act of 1871 ..... 5

A. The award of punitive damages was not contemplated by the 42d Congress; the common law in 1871 foreclosed an award of punitive damages against governments ..... 5

B. The availability of punitive damages does not further the remedial goals of the 42d Congress ..... 9

C. More recently, Congress has analyzed the state of the law under §1983 without suggesting either the existence or the desirability of punitive damages against governments ..... 11

II. The experience of local governments with §1983 claims suggests that the availability of punitive damages will impair their fiscal survival and paralyze their officials from fair decision-making ..... 13

A. One hundred and sixty-nine local governments have reported civil rights claims for all kinds of damages totalling $4 billion ..... 14

B. Thirty-two governments reported punitive damages claims exceeding $1 billion ..... 21

Conclusion ..... 25

Appendix: Final Judgment and Order, *Webster v. City of Houston,* C.A. No. H-78-2053 (SD Tex.) ..... 1a

## TABLE OF AUTHORITIES

*Page*

**Cases:**

*Carey v. Piphus,*
435 U.S. 247 ..... 9

*Carlson v. Green,*
446 U.S. 14..... 7

*Coop v. City of South Bend,*
No. 80-1029 (CA7 Dec. 12, 1980) ..... 20

*Copeland v. Marshall,*
No. 77-1351 (CADC Sept. 2, 1980)..... 20

*Monell v. Department of Social Services,*
436 U.S. 658 ..... 9, 11

*Owen v. City of Independence,*
445 U.S. 622 ..... *passim*

*Pierson v. Ray,*
386 U.S. 547 ..... 6

*Skidmore v. Seattle,*
138 Wash. 340, 244 P. 545..... 8

*Tetalman v. Holiday Inn,*
500 F. Supp. 217 (ND Ga.) ..... 2

*Webster v. City of Houston,*
C.A. No. H-78-2053 (SD Tex. Nov. 18, 1980),
appeal pending (CA5) ..... 4, 5, 23

*Young v. City of Des Moines,*
262 N.W.2d 612 (Iowa)..... 7

**Statutes:**

Civil Rights Act of 1871, 42 U.S.C. §1983..... *passim*

Federal Tort Claims Act, 28 U.S.C. §2674..... 7

Alaska Stat. §09.50.280 (1962)..... 7

Ark. Stat. Ann.(Supp. 1979)
§12-2901..... 8
§12-3401..... 7

Cal. Gov't Code (Deering) §818 (Supp. 1973-1974)..... 7
Colo. Rev. Stat. §24-19-114(4) (1973)..... 7
Del. Code Ann. tit. 10 §4013 (Supp. 1980)..... 8
Fla. Stat. Ann. §768.28(5) (Supp. 1981)..... 7
Ga. Code Ann.
§2-3401 (Supp. 1977) ..... 8
§69-301 *et seq.* (1976)..... 8
Hawaii Rev. Stat. §662-2 (Supp. 1976) ..... 7
Idaho Code §6-918 (1979) ..... 7
Ill. Ann. Stat. ch. 85 §2-102 (Smith-Hurd) (1966)..... 7
Ind. Code Ann. §34-4-16.5-4 (Burns) (Supp. 1980)..... 7
Iowa Code Ann. §25A.4 (Supp. 1979)..... 7
Kan. Stat. Ann. §75-6105(c) (Supp. 1979) ..... 7
Ky. Rev. Stat. §44.070 (Supp. 1979) ..... 8
Me. Rev. Stat. Ann. tit. 14 §8105 (1980) ..... 7
Mass. Ann. Laws ch. 258 §2 (Law. Co-op) (1980) ..... 7
Mich. Stat. Ann. §3.996 (107), (113) (1977) ..... 8
Minn. Stat. §466.04 (1976)..... 7
Miss. Code Ann. §21-15-6 (Supp. 1979)..... 8
Mo. Ann. Stat. §537.610 (Vernon) (Supp. 1981)..... 7
Mont. Rev. Codes Ann. §82-4324 (Supp. 1977)..... 7
Nev. Rev. Stat. §41.035 (1979)..... 7
N.H. Rev. Stat. Ann. §99-D (Supp. 1979)..... 8
N.J. Stat. Ann. §59: 9-2 (West) (Supp. 1980-1981) ..... 8
N.M. Stat. Ann. §41-4-19 (1978) ..... 8
N.C. Gen. Stat. §143-291 (Supp. 1979)..... 8
Okla. Stat. tit. 51 §154 (Supp. 1980) ..... 8
Or. Rev. Stat. §30.270 (2) (Supp. 1979) ..... 8
42 Pa. Cons. Stat. Ann. §5311.101 *et seq.*
(Supp. 1980-1981)..... 8

R.I. Gen. Laws §9-31-2 *et seq.* (1969) ..... 8
S.C. Code §5-7-70 (1976) ..... 8
S.D. Codif. Laws Ann. §21-1-4 (1970) ..... 8
Tex. Civ. Code Ann. tit. 110A Art. 6252-19 §3 (Vernon) (Supp. 1980-1981) ..... 8
Utah Code Ann. §63-30-22 (Supp. 1978) ..... 8
Vt. Stat. Ann. tit. 29 §1403-04 (1970) ..... 8
W.Va. Const. Art. 6 §35 ..... 8
Wis. Stat. Ann. §893.80 (West) (Supp. 1980-1981) ..... 8
Wyo. Stat. §1-39-118(d) (Supp. 1980) ..... 8

**Miscellaneous:**

Civil Rights Improvement Act of 1977: Hearings on S. 35 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) ..... 11, 12-13
Cong. Globe, 42d Cong., 1st Sess. (1871) ..... 4, 9-10
123 Cong. Rec. (daily ed. Jan. 10, 1977) ..... 11
125 Cong. Rec. (daily ed. Nov. 6, 1979) ..... 11
D. Dobbs, Remedies (1973) ..... 6, 13
Federal Tort Claims Act: Hearings before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) ... 7
H.R. 9219, 95th Cong. ..... 7
H.R. 24, 97th Cong. ..... 7
Jaron, The Threat of Personal Liability under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?, 13 Urban Lawyer 1 (1981) ..... 21
Lawsuits Against Police Skyrocket; Few Plaintiffs Ever Convince Juries However, Impact (1980) ..... 21
Prisoners Suing Counties, County News, Jan. 21, 1980 .... 21
S. 35, 95th Cong. ..... 11
S. 1983, 96th Cong. ..... 11

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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**No. 80-396**

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The CITY OF NEWPORT, Rhode Island, *et al.*,

*Petitioners,*

v.

FACT CONCERTS, INC., *et al.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITIONERS, CITY OF NEWPORT, *ET AL.*

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## INTEREST OF THE AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) respectfully submits this brief, pursuant to Rule 42 of the Rules of this Court. The National Institute of Municipal Law Officers is an organization of some 1600 members in all states and is composed entirely of municipalities which are political subdivisions of states. Each member municipality participates in the work of NIMLO through its chief legal officer and his assistants.

These chief legal officers, and their municipalities, are

concerned about the rule of this case as applied not only in cases such as this essentially commercial dispute between equals, but also in all Civil Rights Act cases.

The survey which forms the principal part of this brief documents the quantity of Civil Rights Act claims filed against local governments. But, the quality of some of these claims makes the availability of punitive damages particularly subject to abuse. In *Tetalman v. Holiday Inn,* 500 F.Supp. 217 (ND Ga. 1980), the court rejected a claim under 42 U.S.C. §1983 that a city's advertising campaign designed to promote tourism was the cause of the death of a tourist murdered in the city. The availability of punitive damages in such a case will make local governments less likely to defend a case to trial in order to establish the lack of causation or other refutation of the claim of liability. This is but one illustration of the special relation of government to the governed which makes punitive damages inappropriate in §1983 cases.

## STATEMENT OF THE CASE

The facts relied on by the respondents Fact Concerts as giving rise to the claim of punitive damages are: (1) that the Newport City Council was insufficiently informed on the nature of the music played by the group Blood, Sweat and Tears to intelligently assess whether the group would attract a dangerous type of spectator to a concert at which it appeared;[1] and (2) that the City Council was in error in concluding that violations of a contract between the City and Fact Concerts, determined by the City

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[1]Brief for the Respondents, at 3.

Manager to exist with respect to precautions against the use of chairs as weapons and the availability of an auxiliary generator, were of sufficient gravity to commend enforcement of the contract and cancellation of the concert if it included Blood, Sweat and Tears.[2]

Throughout, threats of litigation against the City were made by Blood, Sweat and Tears[3] and by Fact Concerts.[4] When the contract was finally enforced against it, Fact Concerts obtained an injunction in state court to permit the concert; nonetheless, Fact Concerts sustained a $72,000 loss on its endeavor.[5] After a jury trial, the federal District Court[6] awarded Fact Concerts this amount in compensatory damages, and an amount in punitive damages totalling $150,000.[7]

The City and official petitioners had not objected to the jury instruction on the availability of punitive damages, a circumstance which influenced the resolution of the issue by the Court of Appeals,[8] which concluded that "there arises a distinct possibility municipalities, like all other persons subject to suit under section 1983, may be liable for punitive damages. . . ."[9]

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[2]*Id.*, at 4-5.

[3]*Id.*, at 4.

[4]*Id.*, at 5.

[5]*Id.*, at 5.

[6]Apparently the respondents' reference, Br.6, to an unrelated case is added to their Statement for the purpose of showing prejudice. Yet, the City has made no claim of prejudice in the District Court's denial of the City's motion to upset the jury verdict. In fact, the District Court ordered a remittitur of punitive damages, reducing them from $200,000 to $75,000 against the City. Pet.App. B-12.

[7]The punitive damages were divided $75,000 against the City and $75,000 against its officers. Brief for the Respondents, at 6.

[8]Pet. App. A-15.

[9]*Ibid.*

## SUMMARY OF ARGUMENT

1. The 42d Congress did not intend that punitive damages be available in actions under the Civil Rights Act of 1871 against local governments. The only expression in the debates relevant here was the assertion that the purpose of the Act as a whole was remedial, not punitive. Cong. Globe, 42d Cong., 1st Sess., ~~719~~ 792 (1871) (Rep. Butler). Measured against the uniform unavailability of punitive damages against governments under state law in 1871, Congress cannot be said to have clearly expressed an intention to impose this burden on local governments. This construction is faithful to the remedial purposes of the Civil Rights Act, and the decisions of this Court facilitating a compensatory remedy against local governments.

2. To permit the award of punitive damages, in addition to the free availability of compensatory damages against governments denuded of any defense, would impose a substantial burden on local governments. A survey of 169 municipalities by the amicus reveals claims for compensatory damages of $4 billion, and claims for punitive damages of at least $1 billion against 32 of the municipalities, all pending now. A judgment entered against a city and its officers for $2,500 in compensatory damages and $1,400,000 in punitive damages, is merely illustrative of the danger to local governments nationwide if the judgment is affirmed.

## ARGUMENT

The petitioners here are quite correct in asserting: (1) that the 42d Congress' limited discussion of the availability of punitive damages in an action under 42 U.S.C. § 1983, taken in light of the state of the law in 1871 — the only discussion being statements that the purpose of the Civil Rights Act as a whole was remedial not punitive — can be read only as foreclosing an award of punitive damages today;[10] and (2) that imputation today to the 42d

[10]Brief for the Petitioners, at 10-14.

Congress of an intent it could not have formed will have a deleterious effect on the ability of local governments and their officers to govern both fearlessly and fairly.[11]

We direct ourselves especially to empirical support of the petitioners' second proposition. It is our submission that these data show the paralyzing effect of § 1983 claims for compensatory damages. Punitive damages, often unrelated in amount to compensatory damages,[12] make the paralysis worse. These problems exist with respect to all § 1983 cases, not merely the commercial dispute among equals presented in this case.

## I

## THE AVAILABILITY OF PUNITIVE DAMAGES AGAINST GOVERNMENTS WAS NOT CONTEMPLATED BY THE CONGRESS IN 1871, AND THESE DAMAGES TODAY DO NOT FURTHER THE PURPOSES OF THE CIVIL RIGHTS ACT OF 1871

### A. The Award of Punitive Damages Was Not Contemplated by the 42d Congress; the Common Law in 1871 Foreclosed an Award of Punitive Damages Against Governments

This case presents the question whether the paucity of discussion by the 42d Congress on the availability of punitive

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[11] *Id.*, at 14-17, 22-25.

[12] E.g., a verdict and judgment awarding $2,500 in compensatory damages and $1,400,000 in punitive damages against the City of Houston, Texas, and its officers is set out as the appendix to this brief, 1a.

damages against governments should be read as permitting or foreclosing the present award of such damages.

This Court has canvassed the legislative materials from the 42d Congress several times, with inconsistent results, the most recent occasions being last Term.

The availability of punitive damages against governments today cannot be said to flow from either this Court's decision in *Owen v. City of Independence,* 445 U.S. 622 (1980), or the materials canvassed there.[13]

The decision in *Owen* does not influence the result here because this case, like *Owen,* is a case of statutory construction. And the point of construction is a different one here. "Liability for compensatory damages established, governing legislation may still withhold any punitive liability."[14]

Unlike the issue in *Owen,* here, with respect to punitive damages against local governments, the evidence of the state of the law in 1871 certainly shows that "a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' "[15]

The City has collected the cases in its brief.[16] These cases establish the state of the knowledge of the 42d Congress in 1871:

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[13]We have canvassed these materials in connection with the particular issue in this case. Nothing in the legislative history of § 1983 or in the treatises and other secondary materials published contemporaneously with the 42d Congress, cited by the majority and dissenting Justices of this Court in *Owen,* discussed the availability of punitive damages. We refer to the one mention of the non-punitive purpose of § 1983 by the 42d Congress, at page 9, *infra.*

[14]D. Dobbs, Remedies § 3.9, at 217 (1973).

[15]*Owen, supra,* 445 U.S., at 637 (1980), quoting *Pierson v. Ray,* 386 U.S. 547, 555 (1967).

[16]Brief for the Petitioners, at 26.

that punitive damages were not available against local governments.[17]

The state of the law today is the same: in the absence of an express statute, punitive damages may not be awarded against governments. In at least twenty-six states, punitive or exemplary damages are expressly prohibited by statute.[18] In at least eight

[17]Congresses of more recent vintage have expressly foreclosed punitive damages against governments. The Federal Tort Claims Act forbids them against the federal government. 28 U.S.C. §2674. A bill has been introduced in the 97th Congress to apply some of the entity liability found in *Owen* in §1983 actions against local governments to FTCA actions against the federal government. H.R. 24, §3, at page 6. However, and in spite of this Court's statements in *Carlson v. Green*, 446 U.S. 14, 22 (1980), relied on by the Court of Appeals below, Pet. App. A-14, that bill does not change the FTCA's prohibition of punitive damages. H.R. 24, §4 (punitive damages forbidden for "wrongful acts"). The same language was present in H.R. 9219, §3 (95th Cong.), which was criticized for precluding punitive damages. Federal Tort Claims Act: Hearings before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary, 95th Cong., 2d Sess., 129 (1978).

[18]Statutes apply to state and local governments unless otherwise indicated. Alaska (Alaska Stat. §09.50.280 (1962)) state; Arkansas (Ark. Stat. Ann. §12-3401 (Supp. 1979)) state; California (Cal. Gov't Code (Deering) §818 (Supp. 1973-1974)); Colorado (Colo.Rev.Stat. §24-10-114(4) (1973)); Florida (Fla.Stat.Ann. §768.28(5) (Supp. 1981)); Hawaii (Hawaii Rev. Stat. §662-2 (Supp. 1976)) state; Idaho (Idaho Code §6-918 (1979)); Illinois (Ill.Ann.Stat. ch.85 §2-102 (Smith-Hurd) (1966)) local governments; Indiana (Ind. Code Ann. §34-4-16.5-4 (Burns) (Supp. 1980)); Iowa (Iowa Code Ann. §25A.4 (Supp. 1979)) state, however, punitive damages were allowed against a municipality where statute abrogating immunity of municipalities was silent, *Young v. City of Des Moines*, 262 N.W.2d 612 (Iowa 1978); Kansas (Kan.Stat.Ann. §75-6105(c) (Supp. 1979)); Maine (Me.Rev. Stat.Ann. tit. 14 §8105 (1980)); Massachusetts (Mass.Ann.Laws ch. 258 §2 (Law. Co-op) (1980)); Minnesota (Minn.Stat. §466.04 (1976)) local governments; Missouri (Mo.Ann.Stat. §537.610 (Vernon) (Supp. 1981)); Montana (Mont.Rev. CodesAnn. §82-4324 (Supp. 1977)); Nevada (Nev.Rev.Stat. §41.035 (1979)); New Jersey

*(footnote continued)*

states, damages are limited to a specified amount.[19] In at least six states, the common law concepts of sovereign immunity still exist.[20]

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*(footnote 18 continued)*

(N.J.Stat.Ann. §59:9-2 (West) (Supp. 1980-1981)); New Mexico (N.M.Stat.Ann. §41-4-19 (1978)); Oklahoma (Okla.Stat. tit. 51 §154 (Supp. 1980)) local governments; Oregon (Or.Rev.Stat. §30.270 (2) (Supp. 1979)); South Dakota (S.D. Codif. Laws Ann. §21-1-4 (Supp. 1979) in actions in general, no punitive damages allowed unless expressly authorized by statute); Texas (Tex.Civ.Code Ann. tit. 110A Art. 6252-19 §3 (Vernon) (Supp. 1980-1981)); Utah (Utah Code Ann. §63-30-22 (Supp. 1978)); Wisconsin (Wis. Stat. Ann. §893.80 (West) (Supp. 1980-1981)) local governments; Wyoming (Wyo.Stat. §1-39-118(d) (Supp. 1980)).

[19]Delaware (Del. Code Ann. tit. 10 §4013 (Supp. 1980)); Kentucky (Ky.Rev.Stat. §44.070 (Supp. 1979)); Mississippi (Miss. Code Ann. §21-15-6 (Supp. 1979), purchase of insurance constitutes waiver of immunity for governmental functions to extent of policy limits); North Carolina (N.C. Gen.Stat. §143-291 (Supp. 1979)); Pennsylvania (42 Pa.Cons.Stat.Ann. §5311.101 *et seq.* (Supp. 1980-1981), types of damages recoverable enumerated not including punitive or exemplary damages); Rhode Island (R.I.Gen.Laws §9-31-2 et seq. (1969), limits do not apply where engaged in proprietary function and legislature may, by special act, authorize recovery against local governments in excess of statutory limits); South Carolina (S.C.Code §5-7-70 (1976)); Vermont (Vt.Stat.Ann. tit. 29 §1403-04 (1970) purchase of insurance waives immunity to extent of policy limits, and judgment may not be rendered in excess of policy limits); Washington (*Skidmore v. Seattle,* 138 Wash. 340, 244 P. 545 (1926), punitive damages not available unless expressly authorized by statute).

[20]Arkansas (Art. Stat. Ann. §12-2901 Supp. 1979), local governments are immune from liability for damages); Georgia (Ga. Code Ann. §2-3401, Ga. Const. of 1976, Art. 6 §5, ¶I (Supp. 1977)) state, (§69-301 *et seq.* (1976)) municipal corporations; Maryland (judicial decisions); Michigan (Mich. Stat. Ann. §3.996 (107), (113) (1977)); New Hampshire (N.H.Rev.Stat.Ann. §99-D (Supp. 1979)); South Carolina (judicial decisions); West Virginia (W. Va. Const. Art. 6 §35).

### B. The Availability of Punitive Damages Does Not Further the Remedial Goals of the 42d Congress

While this appropriately ends the matter of statutory construction,[21] it is also abundantly clear that punitive damages do not further the policies seen by the Court in *Owen* as appropriately achieved by an award of compensatory damages.

Certainly, punitive damages, unlike the award contemplated in *Owen*, cannot further the policy that "[t]he innocent individual who is harmed by an abuse of governmental authority [be] assured that he will be compensated for his injury." *Owen, supra*, 445 U.S., at 657. In this case, Fact Concerts was compensated for its $72,000 lost profits; the award of punitive damages was in addition to these compensatory damages, and exceeded them in amount, even after a remittitur of $125,000.

Compensatory damages of the magnitude prayed against the governments responding to NIMLO's survey, discussed *infra*, are quite sufficient to alert government officials to "weigh the risk that a violation might result in an award of damages from the public treasury." *Owen, supra*, 445 U.S., at 656. Punitive damages are not needed for this purpose of deterrence.[22]

The Congress in 1871 was concerned only with deterrence, not punishment. In discussing the Sherman amendment,[23] Representative Butler of Massachusetts said:

"We propose remedy, not punishment.

* * *

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[21]The respondents candidly admit that the text and legislative history of § 1983 do not support the judgment below. Br. 16 ("the effectuation of the underlying goals of section 1983 takes precedence over a mechanical invocation of common law tort rules.")

[22]Cf. Brief for the Respondents, at 9 (deterrence the objects of § 1983, and this Court's decision in *Owen*).

[23]The Court considered the Sherman amendment and the relevance of its rejection in *Monell v. Department of Social Services*, 436 U.S. 658, 666 (1978). Nothing in that analysis affects this case.

"Now, we do not look upon it as a punishment at all. It is a mutual insurance. We are there a community, and if there is any wrong done by our community, or by the inhabitants of our community, we will indemnify the injured party for that wrong, to the value, in our case, of three-fourths of the damages. We will not say to the man who has suffered the loss, 'You shall bear our losses alone;' but we will stand up manfully, put our hands in our pockets, and pay our share of the loss, in order to make good his damage; we will bear equally with him the burden and the wrong.

"The difficulty in the argument — altogether on the other side — has been that this has been treated as if it were a punitive section only. It insures the citizen the protection of the laws; and the considerations as to the want of power to punish or the want of power to interfere with crimes in the States nowhere applies to this section. It is not punitive or penal, but remedial simply."[24]

While this section of the debates considered an amendment which was not enacted as part of the Civil Rights Act of 1871, it certainly indicates that Congress intended to impose on local governments nothing beyond compensation and the deterrence which comes with the requirement to compensate. The Congress certainly did not intend to punish local governments,[25] whose "members" are the same citizens to be protected by deterring official misconduct.

On the other hand, the prospect of additional punitive damages

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[24]Congressional Globe, 42nd Cong., 1st Sess., 719 (1871) (Rep. Butler).

[25]Cf. *Carey v. Piphus*, 435 U.S. 247, 257, n.11 (1978) (dictum) (specific purpose of deterring or punishing), relied on by the Court of Appeals below, Pet. App. A-14.

In any event, the punishment is doubled, as it was in this case, by the availability of punitive damages against both the local government and government officials. Since the government can act only through its officers, it is particularly inappropriate that punitive damages be awarded against both. Moreover, before the remittitur, the punitive award against the City was $200,000, 2.6 times the award against the officials. Pet. App. B-12.

substantially exacerbates the fear of the dissenting Justices in *Owen* that "officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations," 445 U.S., at 669.[26]

### C. More Recently, Congress Has Analyzed the State of the Law Under §1983 Without Suggesting Either the Existence or the Desirability of Punitive Damages Against Governments

Congress, in its most recent examination of §1983, said nothing to suggest a view that punitive damages had been in 1871, or were now, available in civil rights actions against local governments. The principal purpose of S. 35 (95th Congress) was to amend §1983 to provide that governments were "persons".[27] In his introductory statement, Senator Mathias thought the availability of compensatory damages from governments to be sufficient guarantee of "the deterrent value of section 1983. . . ."[28]

Advocates of stronger civil rights enforcement addressed themselves to the provisions of S. 35, fearing the effect of the bill's preclusion of a good-faith defense by governments.[29] Although it is too late in the day to seek a good-faith defense from this Court,

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[26]In this regard, it is noteworthy that the cases supporting the respondents' deterrence justification, Br. 9-10, involved the award of compensatory damages.

[27]This result was achieved in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Nonetheless, a bill similar to S.35 was reintroduced in the next Congress, S.1983 (96th Cong.), introduced at 125 Cong. Rec. 15991 (daily ed. Nov. 6, 1979).

[28]123 Cong. Rec. (daily ed. Jan. 10, 1977), reprinted in Civil Rights Improvement Act of 1977: Hearings on S.35 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., 7 (1978) (hereafter, Hearings on S.35).

[29]This result was achieved in *Owen, supra.*

the fear of these advocates in that regard applies with full force to the stronger *in terrorem* effect of punitive damages:

> "Moreover, we are concerned that the creation of too broad a damage exposure for governments from Section 1983 violations would place unhealthy pressures upon the courts in construing the substantive scope of Section 1983 itself and the rights it secures. We start from the perception that, both historically and as a practical matter for the future, the main utility of Section 1983 is as a foundation for injunctive and declaratory relief, both in criminal and civil litigation. While we believe it most useful to add a damage remedy against the government to the remedies available for many violations of Section 1983, the scope of the damage remedy created should not be so broad as to undermine the principal office of Section 1983 as a vehicle for defining the substantive constitutional rights of citizens.
>
> If a good faith defense is not available to governments in Section 1983 damage actions, theoretically a damage action against the government might be premised upon every holding by a state or federal court that the constitutional rights of a citizen have been violated. Thus, every search and seizure held to be unconstitutional, whether in a state trial court or on certiorari to the Supreme Court, might give rise to a later damage action against the government. Likewise, a court would be often unable to find that Section 1983 had been violated for the purpose of awarding injunctive or declaratory relief without also estopping the government in a later damage suit based upon the same violation. In the case of good faith violations of Section 1983, we do not believe the courts should be given only the extreme choice of denying all relief whatsoever to the plaintiff — by finding that the Constitution and Section 1983 have not been violated at all — or awarding not merely injunctive relief but also opening the door to a substantial damage award. The desire of the courts to avoid a drain upon the public treasury might create

a subtle pressure in the direction of restricting the very definition of constitutional rights in the first place."[30]

## II

## THE EXPERIENCE OF LOCAL GOVERNMENTS WITH §1983 CLAIMS SUGGESTS THAT THE AVAILABILITY OF PUNITIVE DAMAGES WILL IMPAIR THEIR FISCAL SURVIVAL AND PARALYZE THEIR OFFICIALS FROM FAIR DECISIONMAKING

The cases denying punitive damage awards against governments in the absence of express statutory authorization have been questioned for their failure to survey, in support of the denial, "the manner in which liability is imposed on public entities."[31]

NIMLO has surveyed the manner in which — or at least the extent to which — liability is imposed on its member municipal governments.

In connection with an assessment of the overall impact of §1983 litigation, an assessment not limited to the availability of punitive damages and not undertaken for the specific purpose of this case, NIMLO on January 15, 1981 asked the chief legal officer of each of its 1594 member municipalities to report "the total claims now pending . . . under 42 U.S.C. §1981, §1983 and §1985."

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[30]Hearings on S.35, *supra,* at 49 (prepared statement of the Committee on Civil Rights of the Ass'n of the Bar of the City of New York). Assistant Attorney General Days, during whose testimony the Bar Association's statement was introduced, agreed. *Id.*, at 45 ("[I]njunctive relief [is] the most effective way of altering patterns of behavior and requiring close supervision and remedy within an institution, within a governmental entity, for unconstitutional behavior.").

[31]D. Dobbs, Remedies §3.9, at 218 (1973). Dobbs sees the uncertainty as supporting continued denial of punitive damages. *Ibid.*

## A. One Hundred and Sixty-Nine Local Governments Have Reported Civil Rights Claims for All Kinds of Damages Totalling $4 Billion

The report of the first member municipalities, organized by state and ranked by amount within the state, shows a total of $4 billion in pending civil rights claims.[32]

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[32]*Municipal Civil Rights Claims Survey*

[The population and general revenues data for cities are, generally, for 1975 (population) and 1976-77 (revenues), and are taken from International City Management Association, The Municipal Year Book 1980, at 9-44. The data for counties are, generally, for 1975 (population) and 1975-76 (revenues), and are taken from International City Management Association, The County Year Book 1978, at 8-40. In a few cases (marked *), population data are taken from the Bureau of the Census, Census of Population - Number of Inhabitants (1970). Blanks indicate unavailable data.]

| City | Dollar Amount of Civil Rights Claims Now Pending | Population | General Revenues |
|---|---|---|---|
| Arizona | | | |
| Phoenix | $ 160,000,000 | 665,000 | $ 228,508,000 |
| Tempe | 2,550,000 | 84,000 | 23,113,000 |
| Tucson | 1,865,000 | 296,000 | 100,979,000 |
| Arkansas | | | |
| DeQueen | 2,599,150 | 3,863* | |
| California | | | |
| Los Angeles | 200,000,000 | 2,727,000 | 1,158,197,000 |
| Los Angeles County | 59,228,000 | 6,987,000 | 2,861,180,000 |
| El Segundo | 7,110,000 | 15,000 | 10,226,000 |
| Marin County | 5,000,000 | 220,000 | 66,071,000 |
| Roseville | 4,260,000 | 20,000 | 6,710,000 |
| Vallejo | 3,242,600 | 71,000 | 17,011,000 |
| San Bernardino | 2,260,000 | 102,000 | 37,375,000 |
| El Monte | 1,600,000 | 68,000 | 12,430,000 |
| San Diego | 1,500,000 | 774,000 | 235,259,000 |
| Duarte | 1,200,000 | 15,000 | 2,721,000 |
| San Leandro | 1,002,732 | 67,000 | 18,981,000 |
| Burbank | 953,492 | 86,000 | 32,143,000 |

*(footnote continued)*

*(footnote 32 continued)*

| City | Dollar Amount of Civil Rights Claims Now Pending | Population | General Revenues |
|---|---|---|---|
| Colorado | | | |
| Aurora | $ 25,302,000 | | $ |
| Colorado Springs | 10,000,000 | 180,000 | 58,217,000 |
| Denver | 18,440,000 | 485,000 | 358,746,000 |
| Northglenn | 450,000 | 35,000 | 4,458,000 |
| Golden | 110,000 | 13,000 | 1,458,000 |
| Delaware | | | |
| Wilmington | 500,000 | 76,000 | 81,757,000 |
| Smyrna | 500,000 | 4,243* | |
| District of Columbia | 45,000,000 | 712,000 | 1,557,222,000 |
| Florida | | | |
| Clearwater | 5,150,000 | 67,000 | 29,193,000 |
| Volusia County | 3,865,000 | 207,000 | 22,936,000 |
| Jacksonville | 2,546,000 | 535,000 | 220,264,000 |
| Miami Beach | 2,500,000 | 94,000 | 44,613,000 |
| Hallandale | 1,500,000 | 33,000 | 9,599,000 |
| Opa-Locka | 300,000 | 14,000 | 3,077,000 |
| Plantation | 100,000 | 33,000 | 6,019,000 |
| Pensacola | 10,000 | 64,000 | 22,353,000 |
| Deland | 10,000 | 13,000 | 3,471,000 |
| Venice | 5,000 | 11,000 | 3,397,000 |
| Georgia | | | |
| Albany | 5,000,000 | 73,000 | 13,276,000 |
| Douglasville | 900,000 | 12,000 | 1,843,000 |
| Augusta | 155,000 | 54,000 | 17,871,000 |
| Illinois | | | |
| Chicago | 775,093,703 | 3,099,000 | 1,228,706,000 |
| Joliet | 33,822,000 | 74,000 | 19,194,000 |
| St. Charles | 555,000 | 16,000 | 4,077,000 |
| Willowbrook | 290,000 | 1,169* | |
| North Aurora | 150,000 | | |
| Waukegan | 105,000 | 65,000 | 16,969,000 |
| Carbondale | 60,000 | 23,000 | 8,669,000 |
| Hoffman Estates | 50,000 | 32,000 | 4,671,000 |
| Oak Park | 40,000 | 60,000 | 16,895,000 |
| Peoria | 1,008,000 | 126,000 | 31,367,000 |

*(footnote continued)*

*(footnote 32 continued)*

| City | Dollar Amount of Civil Rights Claims Now Pending | Population | General Revenues |
|---|---|---|---|
| Iowa | | | |
| Algona | $ 2,000,000 | 6,032* | $ |
| Council Bluffs | 1,601,200 | 59,000 | 19,561,000 |
| Cedar Rapids | 1,697,251 | 109,000 | 46,274,000 |
| Ames | 1,550,000 | 43,000 | 16,818,000 |
| Sioux City | 270,000 | 86,000 | 32,526,000 |
| Waterloo | 200,000 | 78,000 | 24,977,000 |
| Kansas | | | |
| Wichita | 9,939,000 | 265,000 | 84,717,000 |
| Emporia | 1,860,000 | 22,000 | 5,699,000 |
| Hutchinson | 1,450,000 | 41,000 | 9,213,000 |
| Merriam | 600,000 | 11,000 | 1,605,000 |
| Kentucky | | | |
| Berea | 141,000 | 6,956* | |
| Owensboro | 80,000 | 51,000 | 26,207,000 |
| Winchester | 10,000 | 16,000 | 6,162,000 |
| Maine | | | |
| South Portland | 140,000 | 23,000 | 11,523,000 |
| Waterville | 10,000 | 17,000 | 7,106,000 |
| Maryland | | | |
| Anne Arundel County | 116,000,000 | 344,000 | 233,548,000 |
| Prince George's County | 100,000,000 | 678,000 | 469,427,000 |
| Baltimore | 70,000,000 | 852,000 | 1,082,204,000 |
| Hagerstown | 3,272,000 | 37,000 | 7,858,000 |
| Annapolis | 10,000 | 32,000 | 8,734,000 |
| Massachusetts | | | |
| Methuen | 2,000,000 | 35,000 | 19,718,000 |
| Michigan | | | |
| Flint | 15,600,000 | 174,000 | 141,484,000 |
| Saginaw | 2,000,000 | 86,000 | 36,070,000 |
| Kalamazoo | 1,500,000 | 80,000 | 24,888,000 |
| Plymouth | 250,000 | 12,000 | 2,982,000 |
| Muskegon County | 250,000 | 157,000 | 31,972,000 |

*(footnote continued)*

*(footnote 32 continued)*

| City | Dollar Amount of Civil Rights Claims Now Pending | Population | General Revenues |
|---|---|---|---|
| Minnesota | | | |
| Duluth | $ 1,800,000 | 94,000 | $ 46,677,000 |
| Rochester | 171,000 | 56,000 | 15,189,000 |
| Mississippi | | | |
| Jackson | 600,000 | 167,000 | 65,440,000 |
| Missouri | | | |
| Columbia | 201,000,000 | 63,000 | 16,248,000 |
| Independence | 40,000,000 | 111,000 | 28,133,000 |
| St. Louis | 40,000,000 | 525,000 | 294,518,000 |
| Kansas City | 12,500,000 | 473,000 | 254,463,000 |
| Berkeley | 7,040,000 | 15,000 | 3,252,000 |
| Springfield | 2,501,000 | 132,000 | 48,468,000 |
| Jennings | 480,000 | 18,000 | 3,583,000 |
| Hazelwood | 300,000 | 14,000 | 2,799,000 |
| Nebraska | | | |
| Central City | 1,500,000 | 2,803* | |
| Lincoln | 600,000 | 163,000 | 58,785,000 |
| Omaha | 507,500 | 371,000 | 117,720,000 |
| Nevada | | | |
| Sparks | 15,000,000 | 32,000 | 10,009,000 |
| Las Vegas | 1,250,000 | 146,000 | 41,604,000 |
| New Jersey | | | |
| Newark | 14,050,000 | 340,000 | 368,931,000 |
| New Mexico | | | |
| Grants | 2,000,000 | 8,768* | |
| Farmington | 1,000,000 | 28,000 | 16,522,000 |
| New York | | | |
| New York City | 251,259,465 | 7,482,000 | 14,329,999,000 |
| Scarsdale | 1,780,000 | 19,000 | 7,646,000 |

*(footnote continued)*

*(footnote 32 continued)*

| City | Dollar Amount of Civil Rights Claims Now Pending | Population | General Revenues |
|---|---|---|---|
| North Carolina | | | |
| Greensboro | $ 32,000,000 | 156,000 | $ 32,435,000 |
| Wilson | 7,560,323 | 34,000 | 9,616,000 |
| New Bern | 2,270,261 | 17,000 | 2,902,000 |
| Goldsboro | 1,800,000 | 26,000 | 7,261,000 |
| Pembroke | 1,560,000 | 1,982* | |
| Reidsville | 1,100,000 | 13,000 | 3,068,000 |
| Fayetteville | 300,000 | 66,000 | 13,963,000 |
| Gastonia | 155,000 | 49,000 | 8,875,000 |
| North Dakota | | | |
| Minot | 80,000 | 33,000 | 11, 126,000 |
| Ohio | | | |
| Cleveland | 672,922,500 | 639,000 | 986,940,000 |
| Warrensville Heights | 600,800,000 | 18,000 | 3,068,000 |
| Dayton | 29,890,000 | 206,000 | 91,268,000 |
| Solon | 22,000,000 | 13,000 | 6,091,000 |
| Canton | 13,125,000 | 102,000 | 30,298,000 |
| Newark | 600,000 | 39,000 | 7,250,000 |
| Steubenville | 350,000 | 28,000 | 9,287,000 |
| Kettering | 350,000 | 70,000 | 10,222,000 |
| Fairborn | 100,000 | 33,000 | 4,841,000 |
| Cuyahoga Falls | 50,000 | 47,000 | 10,192,000 |
| Middletown | 25,000 | 48,000 | 30,742,000 |
| Oklahoma | | | |
| Edmond | 2,179,520 | 23,000 | 5,375,000 |
| Del City | 1,907,889 | 30,000 | 2,909,000 |
| Enid | 201,500 | 48,000 | 8,065,000 |
| Geary | 115,000 | 1,380* | |
| Oregon | | | |
| Portland | 61,505,997 | 357,000 | 140,339,000 |
| Lake Oswego | 750,160 | 19,000 | 6,117,000 |
| Gresham | 224,636 | 23,000 | 5,425,000 |
| Pennsylvania | | | |
| Philadelphia | 100,000,000 | 1,816,000 | 1,212,708,000 |
| Pittsburgh | 180,000 | 459,000 | 151,088,000 |
| Rostraver Township | 10,000 | | |

*(footnote continued)*

*(footnote 32 continued)*

| City | Dollar Amount of Civil Rights Claims Now Pending | Population | General Revenues |
|---|---|---|---|
| Rhode Island | | | |
| Newport | $ 5,000,000 | 29,000 | $ 25,405,000 |
| South Carolina | | | |
| Spartanburg | 100,000 | 47,000 | 11,239,000 |
| Tennessee | | | |
| Jackson | 5,000,000 | 43,000 | 38,121,000 |
| Franklin | 475,000 | 12,000 | 2,451,000 |
| Knoxville | 360,000 | 183,000 | 93,206,000 |
| Nashville & Davidson County | 250,000 | 423,000 | 289,873,000 |
| Waverly | 200,000 | 3,794* | |
| Texas | | | |
| Houston | 60,000,000 | 1,327,000 | 410,987,000 |
| Dallas | 59,000,000 | 813,000 | 274,618,000 |
| Amarillo | 10,100,002 | 139,000 | 52,976,000 |
| San Antonio | 7,000,000 | 773,000 | 161,251,000 |
| Pasadena | 6,650,000 | 95,000 | 15,669,000 |
| Plano | 7,500,000 | 37,000 | 8,579,000 |
| Grand Prairie | 5,880,000 | 57,000 | 23,202,000 |
| El Paso | 5,757,000 | 386,000 | 77,681,000 |
| Waco | 1,625,000 | 98,000 | 27,549,000 |
| Arlington | 455,000 | 111,000 | 22,464,000 |
| Hurst | 225,000 | 28,000 | 5,001,000 |
| Utah | | | |
| Salt Lake City | 8,960,398 | 170,000 | 48,359,000 |
| Logan | 451,000 | 24,000 | 3,386,000 |
| Vermont | | | |
| Montpelier | 140,000 | 8,609* | |
| Virginia | | | |
| Roanoke | 9,961,750 | 101,000 | 82,766,000 |
| Arlington County | 2,000,000 | 156,000 | 125,983,000 |
| Norfolk | 1,440,055 | 287,000 | 217,811,000 |
| Portsmouth | 1,310,000 | 109,000 | 78,604,000 |
| Carroll County | 200,000 | 24,000 | 7,852,000 |
| Loudoun County | 20,000 | 49,000 | 24,149,000 |

*(footnote continued)*

The total of $4 billion in civil rights claims against 169 jurisdictions, as many of them pointed out in their responses, is not the upper limit of the claims. A combination of the plaintiffs' power to amend their complaints and to plead "for such other relief as the Court deems just" has caused municipal officials to consider the actual exposure of their governments to be substantially higher than the reported figures. The reported figures, of course, do not reflect the cost of municipal defense, or the cost of court-ordered attorneys' fees to prevailing plaintiffs.[33]

*(footnote 32 continued)*

| City | Dollar Amount of Civil Rights Claims Now Pending | Population | General Revenues |
|---|---|---|---|
| Washington | | | |
| Vancouver | $ 100,000 | 48,000 | $ 14,678,000 |
| Tacoma | 45,000 | 151,000 | 64,637,000 |
| West Virginia | | | |
| Logan | 600,000 | 3,311* | |
| Buckhannon | 250,000 | 7,261* | |
| Wisconsin | | | |
| Brown County | 35,530,000 | 169,000 | 33,339,000 |
| Green Bay | 715,000 | 91,000 | 65,673,000 |
| Brookfield | 180,000 | 33,000 | 8,815,000 |
| Whitefish Bay | 25,000 | 17,000 | 3,019,000 |
| Wisconsin Dells | 20,000 | 2,401* | |
| Wyoming | | | |
| Casper | 3,800,150 | 41,000 | 14,011,000 |
| Jackson | 2,800,000 | 2,101* | |
| Powell | 500,000 | 4,807* | |
| | $4,116,311,276 | Total Current Civil Rights Claims Against 169 Municipalities | |

[33]These fees are not limited by the amounts claimed, or recovered, on the merits of the civil rights claims. E.g., *Copeland v. Marshall,* No. 77-1351 (CADC Sept. 2, 1980) (en banc) ($33,000 recovery, $160,000 attorneys' fees); *Coop v. City of South Bend,* No. 80-1029 (CA7 Dec. 12, 1980) ($510 recovery, $6000 attorneys' fees).

These data are consistent with the few other studies of post-*Monell* claims against local governments.[34]

### B. Thirty-two Governments Reported Punitive Damages Claims Exceeding $1 Billion

Although a specification of punitive damages claimed was not requested, 32 of the municipalities responding to the NIMLO questionnaire did set out their punitive damages figures, as follows:

| City | Punitive Damages Claimed |
|---|---|
| Arizona | |
| Tempe | $ 1,400,000 |
| California | |
| El Segundo | 1,100,000 |
| Vallejo | 1,000,000 |
| Stockton | 600,000 |
| Orange Cove | 150,000 |
| Delaware | |
| Smyrna | 250,000 |
| Illinois | |
| Joliet | 30,115,000 |
| North Aurora | 100,000 |
| Carbondale | 55,000 |
| Iowa | |
| Waterloo | 100,000 |

*(table continued)*

[34]E.g., Prisoners Suing Counties, County News, Jan. 21, 1980, at 12 (Nat'l Ass'n of Counties, Washington, D.C.), summarized in Jaron, The Threat of Personal Liability under the Federal Civil Rights Act; Does It Interfere with the Performance of State and Local Government?, 13 Urban Laywer 1, 24 (1981); Lawsuits Against Police Skyrocket; Few Plaintiffs Ever Convince Juries However, Impact, 1980, at 2 (Americans for Effective Law Enforcement, South San Francisco, California) (increase in filings from 1723 in 1967 to 10,633 in 1976, the latter figure being 1 case per 51 full-time police officers).

*(table of punitive damages continued)*

| City | Punitive Damages Claimed |
|---|---|
| Kansas | |
| Hutchinson | $ 1,450,000 |
| Emporia | 1,000,000 |
| Maryland | |
| Hagerstown | 770,000 |
| Michigan | |
| Saginaw | 500,000 |
| Missouri | |
| Columbia | 100,500,000 |
| Jennings | 320,000 |
| New York | |
| New York City | 346,000,000 |
| North Carolina | |
| Goldsboro | 1,000,000 |
| Ohio | |
| Cleveland | 436,355,000 |
| Warrensville Heights | 100,000,000 |
| Cuyahoga Falls | 420,000 |
| Steubenville | 100,000 |
| Oklahoma | |
| Edmond | 1,125,700 |
| Oregon | |
| Lake Oswego | 1,600,000 |
| Tennessee | |
| Franklin | 5,295,000 |
| Waverly | 50,000 |
| Texas | |
| Plano | 1,000,000 |
| Houston | 200,000 |

*(table continued)*

*(table of punitive damages continued)*

| City | Punitive Damages Claimed | |
|---|---|---|
| Utah | | |
| Logan | $ 150,000 | |
| Virginia | | |
| Portsmouth | 525,000 | |
| West Virginia | | |
| Logan | 300,000 | |
| Wisconsin | | |
| Brookfield | 150,000 | |
| | $1,033,681,200 | Total Punitive Damages Currently Claimed Against 32 Municipalities |

One particular example, set out as the appendix to this brief, at 1a, illustrates that nothing in the reasoning of the opinions of the members of this Court in *Owen* contemplated the case of punitive damages. In a verdict and judgment against the City of Houston, Texas, and its officials, *Webster v. City of Houston,* C.A. No. H-78-2053 (SD Tex. Nov. 18, 1980), appeal pending (CA5), the District Court approved the award of $2500 in compensatory damages and the award of $200,000 in punitive damages against the City and a total of $1,200,000 punitive damages against city officials.

The amount of these claims shows two things.

First, punitive damages are not needed to spur municipal vigilance, nor is the availability of them necessary to encourage individual plaintiffs to expand the horizon of "those constitutional deprivations that have not previously been clearly defined."[35] Four billion dollars in claims, mostly for compensatory damages, seems quite sufficient to aid the flow of adrenalin of both plaintiffs and defendants in §1983 actions.

Second, the harm to municipal operations, the fear of which animated the dissenting Justices in *Owen* to decry the availability of compensatory damages against defenseless municipalities, and which animated state courts and the Congress to forbid punitive damages against governments, has become based in reality.

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[35] *Owen, supra,* 445 U.S., at 651, n. 33.

## CONCLUSION

This case is governed by no other decision of this Court. At the same time, speculation in dissent in *Owen* has proved to be an accurate appraisal of the effect punitive damages claims will have on municipal operations.

Nothing in the text, legislative history, or policy of full preservation of civil rights, of the Civil Rights Act of 1871 requires such a result.

The judgment should be reversed and the case remanded.

Respectfully submitted,

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March, 1981

## APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| JOHN RUSSELL WEBSTER, et al. | ) | |
| | ) | |
| vs. | ) | CIVIL ACTION |
| | ) | NO. H-78-2053 |
| | ) | |
| THE CITY OF HOUSTON, et al. | ) | |

## FINAL JUDGMENT

This action came on for trial before the Court and a jury on the 7th day of October 1980, and the Court having granted the motions for directed verdict of Defendants P. D. Dillon and J. A. Estes at the conclusion of Plaintiff's evidence, and further having granted Defendant W. E. Byrd's motion for directed verdict at the conclusion of the Defendants' evidence, and the jury having returned the following verdict:

1) that Defendant N. W. Holloway was not liable for violating Randall Allen Webster's constitutional rights;
2) that Defendants D. H. Mays, J. T. Olin, and the City of Houston were liable for violating Randall Allen Webster's constitutional rights;
3) that Plaintiffs John Russell Webster and Billie Ruth Webster sustained $2,548.73 in actual damages;
4) that D. H. Mays be assessed $1,000,000.00 in punitive damages;
5) that J. T. Olin be assessed $200,000.00 in punitive damages;
6) that the City of Houston be assessed $200,000.00 in punitive damages;

and the Court having accepted, received and filed the jury's verdict, it is accordingly

ORDERED, ADJUDGED and DECREED that the Plaintiffs John Russell Webster and Billie Ruth Webster, have and recover from Defendants D. H. Mays, J. T. Olin, and the City of Houston, jointly and severally, the sum of Two Thousand Five Hundred Forty-eight Dollars and Seventy-three Cents ($2,548.73), and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiffs John Russell Webster and Billie Ruth Webster, have and recover from Defendant D. H. Mays the sum of One Million Dollars ($1,000,000.00), and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiffs John Russell Webster and Billie Ruth Webster, have and recover from Defendant J. T. Olin the sum of Two Hundred Thousand Dollars ($200,000.00), and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiffs John Russell Webster and Billie Ruth Webster have and recover from Defendant the City of Houston, the sum of Two Hundred Thousand Dollars ($200,000.00), and it is further

ORDERED, ADJUDGED and DECREED that costs of this action, including a reasonable attorney's fee to be determined by the Court, be taxed against Defendants D. H. Mays, J. T. Olin, and the City of Houston, and it is further

ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing by this action against Defendants P. D. Dillon, N. W. Holloway, J. A. Estes, and W. E. Byrd.

THIS IS A FINAL JUDGMENT.

SIGNED and ENTERED this 18th day of November 1980.

/s/ George E. Cire

GEORGE E. CIRE
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| JOHN RUSSELL WEBSTER, et al. | ) | |
| | ) | |
| vs. | ) | CIVIL ACTION |
| | ) | NO. H-78-2053 |
| | ) | |
| THE CITY OF HOUSTON, et al. | ) | |

**ORDER**

The Court has considered the motions of Defendants Olin and the City of Houston for remittitur and finds that the relief requested herein should be denied. It is therefore

ORDERED that Defendant Olin's Motion for Remittitur be DENIED, and it is further

ORDERED that Defendant City of Houston's Alternative Motion for Remittitur be DENIED.

SIGNED and ENTERED this 18th day of November 1980.

/s/ George E. Cire

GEORGE E. CIRE
UNITED STATES DISTRICT
JUDGE

No. 80-396

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity
as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All Individually and in Their Official Capacity
as Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

---

## AMICUS CURIAE BRIEF
## OF THE CITY OF SANTA ANA, CALIFORNIA,
## IN SUPPORT OF PETITIONERS

---

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SUBJECT INDEX

Brief Amicus Curiae

STATEMENT OF THE CASE ..... 9

(A) The Execution Of The Contract..... 9

(B) The Contract Provisions In Dispute..... 10

(C) The Nature Of The Dispute Which Arose In The Execution Of The Contract..... 11

(D) The Litigation In The State Court System..... 14

(E) The Litigation In The Federal Court System..... 14

ARGUMENT..... 19

THE FEDERAL JUDGMENT AGAINST THE CITY OF NEWPORT FOR PUNITIVE DAMAGES IN THE CIVIL RIGHTS ACTION (42 U.S.C. SECTION 1983) MUST BE REVERSED FOR LACK OF JURISDICTION IN THE FEDERAL DISTRICT COURT TO HEAR THE MATTER..... 19

(A) Facts Concerts Inc., Has Failed To State A Claim Upon Which Federal Jurisdiction Can Be Based..... 19

(B) The Public Policy Expressed In Owen v. City Of Independence, Mo., Precludes An Award Of Punitive Damages Against Local Public Entities Under 42 U.S.C. Section 1983..... 24

(C) Under Board Of Regents Of The University Of New York v. Tomanio And 42 U.S.C., §1988, This Court May Not Disregard The Law In Those States Which Prohibits An Award Of Punitive Damages Against A Public Entity..... 26

(C)(1) To Permit A Federal Court To Award Punitive Damages Against A Municipality In The Execution Of Its Governmental Contracts, In Those States Where State Law Specifically Prohibits Punitive Damages Generally, Would Violate The Basic Principles Of State Sovereignty Which Are Embodied In The Eleventh Amendment To The Federal Constitution..... 27

CONCLUSION..... 30

## TABLE OF AUTHORITIES

### CONSTITUTION, STATUTES, CODES, AND RULES

Allen v. McCurry et al., ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___ (Dec. 9, 1980)..... 5, 6, 19, 21, 22, 23

Board of Regents of The University of New York et al. v. Tomanio, ___ U.S. ___, 64 L.Ed.2d 440, 100 S.Ct. ___ (May 19, 1980)..... 23, 26

Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614..... 28

Facts Concerts Inc., et al. v. City of Newport, 626 F.2d 1060 (June 17, 1980)Hans v. Louisiana, 134 U.S. 1, 33 L.Ed.2d 42, 10 S.Ct. 504..... 6, 7

Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (March 18, 1975)..... 3, 4, 5

Hans v. Louisiana, 134 U.S. 1, 43 L.Ed.2d 42, 10 S.Ct. 504..... 27

Judice v. Vail, 430 U.S. 327, 51 L.Ed.2d 376, 97 S.Ct. 1211 (Mar. 22, 1977)..... 3, 5

Martinez v. California, ___ U.S. ___, 62 L.Ed.2d 481, 100 S.Ct. ___ (Jan. 15, 1980)..... 7, 4, 19, 20

Mitchell Brothers' Santa Ana Theater; Cinema 7, Inc., a California corporation vs. City Council of the City of Santa Ana; David L. Brandt; Gordon Bricken;

Mitchell Brothers' Santa Ana Theater; Cinema 7, Inc., a California corporation vs. City Council of the City of Santa Ana; David L. Brandt; Gordon Bricken; Vernon S. Evans; John Garthe; David F. Ortiz; James E. Ward; Harry Yamamoto; Keith L. Gow and James J. Clancy, Civil No. 80-959-FW..... 2

Monell v. New York City Department of Social Services, 436 U.S. 695, 56 L.Ed.2d 611, 98 S.Ct. 2018..... 8

Moore v. Sims, 442 U.S. 415, 60 L.Ed.2d 994, 99 S.Ct. 2371 (June 11, 1979)..... 4, 5

Owen v. City of Independence, Mo., ___ U.S. ___, 63 L.Ed.2d 673, 100 S.Ct. ____ (April 16, 1980)..... 8, 20, 21, 24

Parden v. Terminal, R.Co., 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207..... 28

Rosener v. Sears Roebuck and Co., 110 Cal.App.3d 740, 168 Cal.Rptr. 237..... 29

Snepp v. U.S., 595 F.2d 926..... 29

Snepp v. U.S., ___ U.S. ___, 62 L.Ed.2d 704, 100 S.Ct. ____ (Feb. 19, 1980)..... 29

Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546,..... 23

State of Nevada v. Hall, 440 U.S. 410, 59 L.Ed.2d 416, 99 S.Ct. 1182 (March 5, 1979)..... 28

Trainor v. Hernandez, 431 U.S. 434, 52 L.Ed.2d 486, 97 S.Ct. 1911 (May 31, 1977)..... 4, 5

Vance et al., v. Universal Amusement Co., Inc., October Term, 1979 No. 78-1588..... 2

42 U.S.C. section 1983.... 7, 14, 19, 20, 21, 26

California Government Code Section 818..... 2

F.R.C.P., Rule 12(f)..... 2

# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

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THE CITY OF NEWPORT,
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RESPONDENTS.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

---

AMICUS CURIAE BRIEF
OF THE CITY OF SANTA ANA, CALIFORNIA,
IN SUPPORT OF PETITIONERS

---

## INTEREST OF AMICUS CURIAE

Amicus Curiae has a special interest in the subject of this appeal, in that its City Attorney, the Special Counsel to the City, and the seven members of its City Council, acting individually and in their official capacity, are defendants in a Civil Rights Action filed in the United States District Court, Central District of California on March 12, 1980, alleging constitutional torts incident to certain State Court civil abatement proceedings.[1] A motion to strike the claim for punitive damages pursuant to F.R.C.P. 12(f) is presently pending in the U.S. District Court on the ground that the statutes of the State of California do not

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[1] The Civil Rights Action is entitled Mitchell Brothers' Santa Ana Theater; Cinema 7, Inc, a California corporation vs. City Council of the City of Santa Ana; David L. Brandt; Gordon Bricken; Vernon S. Evans; John Garthe; David F. Ortiz; James E. Ward; Harry Yamamoto; Keith L. Gow and James J. Clancy, Civil No. 80-959 FW. See, also, Amicus Curiae Brief of the City of Santa Ana, California, in Support of Petition for Rehearing in Vance et al., v. Universal Amusement Co., Inc., October Term, 1979 No. 78-1588 at page 8, footnotes 4 and page 15 footnote 6.

permit punitive damages against a public entity. See California Government Code section 818.

The above-named special counsel to Amicus Curiae was also the attorney of record in the Ohio Public Nuisance Abatement case, Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (March 18, 1975) in which it was argued on appeal that the U.S. District Court lacked jurisdiction and was required to dismiss the Civil Rights Action. This Court's decision in Huffman v. Pursue, Ltd., supra, remanding the case to the U.S. District Court:

> ". . . so that the District Court may consider whether irreparable injury can be shown in light of 'Without a Stitch,' and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind." (Our emphasis)

was further applied in Judice v. Vail, 430 U.S. 327, 51 L.Ed.2d 376, 97 S.Ct. 1211 (Mar. 22, 1977). In his dissent in Judice, Justice Stewart significantly noted as to what is required under Huffman v. Pursue Ltd., supra:

> "Both types of 'abstention' of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and functions. But there is a significant difference in result between the two. Under Pullman abstention, the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under Younger it may not." (Our emphasis.)

see also Trainor v. Hernandez, 431 U.S. 434, 445, 52 L.Ed.2d 486, 493, 97 S.Ct. 1911 (May 31, 1977)[2] and Moore v. Sims, 442 U.S. 415, 430, 60 L.Ed.2d 994. 1007, 99 S.Ct. 2371 (June 11, 1979), citing the Trainer v. Hernandez text

[2] In Trainor v. Hernandez, supra, this Court held that where Huffman v. Pursue Ltd. applies, the Court should dismiss the case:

> "For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state

noted above, in holding that the principles of Younger-Huffman acted as a bar.

While the language of the U.S. Supreme Court in Huffman v. Pursue, Ltd., supra, Judice v. Vail, supra, Trainer v. Hernandez, supra, and Moore v. Sims, supra, does not specifically hold that federal "jurisdiction" is in question, that appears to be the necessary result under the rationale expressed in Allen v. McCurry, supra, where the trial court facts show that the constitutional claim can be raised and fully

footnote 2 continued:

> officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent. This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which Younger and Samuels v. Mackell primarily rest apply in full force here. The pendency of the state court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extradordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim." (Our emphasis.)

litigated in a Civil Action in the state court.

It would seem, therefore, that the constitutional rule must evolve that, in a lawsuit such as Fact Concerts, Inc. v. The City of Newport, et al., where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the federal constitutional issue is "pendent" to the main contract claim, and (2) such federal constitutional claim may be asserted affirmatively either as a remedy in the contract action in the State Court or joined as an independent cause of action in such state court action, the party must first assert the federal claim in the contract action in the state court. Dismissal of such action can be justified either on the ground that a federal court does not have "jurisdiction" to hear such a separate civil rights action until such federal claim has been rejected in the state court system, Allen et al. v. McCurry, supra, or the plaintiff has failed to plead the necessary facts to state a cause of

action upon which relief can be based. Martinez v. California, supra.

Unless the judgment in Fact Concerts Inc., et al. v. The City of Newport et al., 626 F.2d 1060 (June 17, 1980) is reversed on jurisdictional grounds, any party to a contract with a municipality who "claims" a constitutional tort in the execution of the contract will be able to enter the federal system under a 42 U.S.C. section 1983 claim and litigate such contract claim in the federal system. The fact that the City of Newport did not raise the "jurisdictional" issue in the trial court should not be allowed to establish a precedent and create federal jurisdiction where it does not properly exist.

More importantly to the Amicus Curiae City of Santa Ana (which has been in litigation in the state court system for more

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[3] The City of Newport did, however, move to dismiss for failure to state a claim upon which relief could be based. See Fact Concerts Inc. v. City of Newport, 626 F.2d 1060 at 1063.

than four years on four state civil public nuisance abatement actions in which it has expended more than $190,000.00) this Court should place both (a) jurisdictional, and (b) financial limitations on the newly created liability of Cities established by this Court in Monell v. New York City Department of Social Services, 436 U.S. at 695, 56 L.Ed.2d 611, 98 S.Ct. 2018 and Owen v. City of Independence, Mo., ___ U.S. ___, 63 L.Ed.2d 673, 100 S.Ct. ___ (April 16, 1980). Broadly speaking, this Court should require federal claims, which are "pendent" to state court matters, be raised in the civil action in the state court. Under the present state of the economy, an "average" municipality cannot afford a staff of attorneys to litigate governmental claims in the federal system at the same time they are being litigated in the state court system. In no event, should punitive damages be awarded. Amicus Curiae submits that unless remedied, the natural consequence of this extension of federal

jurisdiction will be governmental paralysis.

## STATEMENT OF THE CASE

### (A) The Execution Of The Contract.[4]

In the early summer of 1975, Plaintiff Fact Concerts, Inc. (Fact Concerts) through its President Frank Amado (Amado) and Plaintiff Marvin Lerman (Lerman) discussed holding a two-day jazz festival in the City of Newport. Amado had previously obtained a lease from the Rhode Island Department of Natural Resources to hold three concerts in Fort Adams, a large, state-owned facility located in Newport, Rhode Island and then sought licenses from the City of Newport. Amado obtained a license from the City of Newport and successfully staged a first concert featuring Arthur Fiedler. Amado had also applied for, in May, 1975, and been granted a license by the City Council for two jazz concerts to be given at Fort Adams on August 2nd and 3rd. Subsequently, the Plaintiffs

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[4] See Statement of the Case in Brief in Opposition to the Petition for a Writ of Certiorari at page 2.

successfully sought a substitution of August 30 and 31 from the Council, which granted a license through a contract dated August 22, 1975 and duly authorized it by vote.

(B) The Contract Provisions In Dispute.

Plaintiff Fact Concerts contends[5] that the contract did not grant the City the right to approve performers who would appear, nor did it designate the type of music to be played, referring only to a "music concert" and acknowledges the city retained the right to cancel only "if the interests of public safety demand."

In cancelling the contract, the City of Newport contended[6] that it was justified in relying upon paragraph 2 and paragraph 7 of the contract. The contract provided in paragraph 2 that:

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5 See Statement of the Case in Brief in Opposition to the Petition for a Writ of Certiorari at page 2.

6 See Statement of Facts in Petition for a Writ of Certiorari at page 3.

"It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interest of the public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation."

In Paragraph 7 it further provided:

"The Producer agrees to comply with all orders of the Director of Public Safety with reference to fire and police protection and safety including, but not limited to, the following:

(a) Auxiliary generator for lighting;
(b) Firefighters for fire protection and First Aid duties;
(c) Portable firefighting equipment, state area;
(d) Seating to be arranged so that aisles point near exits off the field as well as possible - all chairs to be wired together. Exits and entrances shall be provided as directed;
(e) All seats to be installed and ready for occupancy no later than 3:00 P.M. on August 29, 1975."

(C) The Nature Of The Dispute Which Arose In The Execution Of The Contract.

Plaintiffs began in the summer of 1975 to book top jazz acts. However, one attraction, Sarah Vaughan, was unavailable, and Plaintiffs substituted an alternative group called Blood,

Sweat and Tears. This group triggered the events at the heart of the case. Plaintiffs considered Blood, Sweat and Tears a jazz group equivalent in stature to Sarah Vaughan, based upon the group's appearance in Carnegie Hall, representing the United States on State Department-sponsored jazz tours, and appearing at major jazz festivals. Plaintiffs advertised the jazz concerts, including an August 24, 1975 ad in the New York Times, announcing the addition of Blood, Sweat and Tears.[7]

On the Monday before the concerts, August 24, 1975, Amando received notice of a problem. He called Mayor Donnelly, who talked about cancellation of Blood, Sweat and Tears because he did not want any rock groups appearing in Newport. The next day Fact Concerts officials attended a special City Council meeting. The Fact Concerts group was told that Blood, Sweat and Tears would have to be removed or the

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[7] See Statement of the Case in Brief in Opposition to the Petition for writ of certiorari at page 2.

license would be revoked. The Mayor said that Blood, Sweat and Tears would bring a long-haired element that the City did not want. A Fact Concerts spokesman explained that Blood, Sweat and Tears was a jazz group, but this information was rejected.

After further meetings on August 28th and August 29th, the City Council acted on the matter. A motion was made, seconded and approved unanimously to cancel the contract. All of the councilmen who later testified, indicated that they were concerned because of earlier disturbances (in 1960, 1969 and 1971) at so-called rock concerts and that it was this concern that prompted the vote to cancel.

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[8] See Statement of the Case in Brief in Opposition to the Petition for Writ of Certiorari at page 3.

[9] See Statement of Facts in Petition For a Writ of Certiorari at page 5.

(D) The Litigation In The State Court System.[10]

The next day, Saturday, August 30th, the plaintiffs obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned including the appearance of Blood, Sweat and Tears on Sunday, August 31st. Approximately 6400 people attended the two-day event.

(E) The Litigation In The Federal Court System.[10]

Thereafter Fact Concerts, Inc. and Marvin Lerman (one of the promoters) brought a five count complaint in the United States District Court for the District of Rhode Island seeking declaratory relief, redress for a violation of their First Amendment rights, and compensatory and punitive damages for various pendent contract claims.

At trial the complaint was reduced to two

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10 The sole ground for federal jurisdiction is 42 U.S.C. Section 1983. If the plaintiffs have failed to state a claim under 42 U.S.C. § 1983, the lawsuit must be dismissed.

counts, the first a Section 1983 claim[11] and the second a claim for interference with contractual relationships.

The jury answered interrogatories finding all defendants liable on both counts and awarding $72,000.00 compensatory damages and punitive damages in the total amount of $275,000.00 of which $200,000.00 was assessed against the City of Newport.

A Motion for Judgment N.O.V. and a New Trial was filed and after hearing thereon the trial justice ordered a remittitur of $125,000.00 of the punitive damages award against Newport and sustained the verdicts in all other respects.

The United States Court of Appeals for the First Circuit affirmed.

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[11] See Statement of Facts in Petition for Writ of Certiorari at page 6.

## SUMMARY OF ARGUMENT

The federal judgment against the City of Newport for punitive damages must be reversed for lack of jurisdiction in the federal district court to hear the main contract claim, and for failure of the plaintiffs to state a claim upon which federal relief can be based.

Where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the constitutional issue is "subordinate" and "pendent" to the main contract claim, and (2) the state court appears to be ready and willing to undertake full litigation of the contract claim and the "pendent" constitutional claim, and has already granted partial relief, a cause of action under 42 U.S.C. section 1983 cannot be stated upon which federal jurisdiction can be based. Martinez v. California; Allen v. McCurry et al.

It was never intended that the federal courts should have jurisdiction where the state courts stand ready and willing and are available

"to allow full litigation of a constitutional claim" Allen et al. v. McCurry.

It can no longer be claimed that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court. It clearly was not the intention of Congress in 1871 to establish concurrent jurisdiction in the federal court over all municipal contracts wherein one of the contracting parties claims a constitutional tort in the execution of that governmental contract. Allen et al. v. McCurry.

Fact Concerts Inc. cannot rely upon Southeastern Promotion Ltd. v. Conrad, which is distinguishable. Southeastern Promotion Ltd, was a "prior restraint" case in which the plaintiffs were denied a license and the opportunity to perform. Here, "Blood Sweat and Tears" was granted the license and did perform. The only "live" dispute was as to the rights of the respective parties under the municipal contract.

The public policy expressed in Owen v. City

of Independence, Missouri precludes an award of punitive damages against local public entities under 42 U.S.C. section 1983.

A federal court may not disregard the public policy in States like California which prohibit an award of punitive damages against a public entity. Board of Regents of the University of New York v. Tomanio; Eleventh Amendment.

A federal court may not disregard the public policy of those states which generally prohibit an award of punitive damages. Eleventh Amendment; Hans v. Louisiana; Parden v. Terminal R. Co.; Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare.

Unless the judgment in Fact Concerts Inc., et al. v. The City of Newport et al., 626 F.2d 1060 (June 17, 1980) is reversed on jurisdictional grounds, any party to a contract with a municipality who "claims" a constitutional tort in the execution of the

contract will be able to enter the federal system under a 42 U.S.C. section 1983 claim and litigate such contract claim in the federal system. A federal trial court should not be allowed to "create" federal jurisdiction where it does not properly exist.

## ARGUMENT

### THE FEDERAL JUDGMENT AGAINST THE CITY OF NEWPORT FOR PUNITIVE DAMAGES IN THE CIVIL RIGHTS ACTION (42 U.S.C. SECTION 1983) MUST BE REVERSED FOR LACK OF JURISDICTION IN THE FEDERAL DISTRICT COURT TO HEAR THE MATTER.

### (A) Fact Concerts Inc., Has Failed To State A Claim Upon Which Federal Jurisdiction Can Be Based.

Where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the constitutional issue is "pendent" to the main contract claim, and (2) the state court appears to be ready and willing to undertake full litigation of the contract claim and the "pendent" constitutional claim, and has already granted partial relief, a cause of action under 42 U.S.C. § 1983 cannot be stated upon which federal jurisdiction can be based. Under Martinez v. California, ___ U.S. ___, 62 L.Ed.2d 481, 100 S.Ct. ____ (Jan. 15, 1980) and Allen v. McCurry et al., ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___ C.C.H., U.S. Supreme Court Bulletin at pages B 395 - B 422. (December 9, 1980), the federal complaint should

have been dismissed for failure to state a claim upon which relief can be based.

In Martinez v. California, (supra), this Court held that, under the specific facts pleaded, the survivors of a parolee's murder victim had not stated a cause of action against officials, where a state statute immunized parole officials from injuries resulting from parole decisions. Under Martinez v. California, supra, the U.S. District Court has the power and duty to decide whether or not, under the specific facts alleged, the plaintiffs have stated a cause of action under 42 U.S.C. § 1983. See Martinez v. California, supra, at 481:

> ". . . we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment.
>
> ". . . We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decendent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim

> has been described as 'a species of tort liability,' Imbler v. Pachtman, 424 U.S. 409, 417, 47 L.Ed.2d 128, 96 S.Ct. 984, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." (Our emphasis.)

In Allen et al. v. McCurry, supra, a majority of this Court had occasion to rethink the legislative intent and rationale which authorized federal jurisdiction in Civil Rights cases, (42 U.S.C. section 1983). In that decision, the majority made it clear that, except where the claim was made that a state statute was unconstitutional on its face, it was never intended that the federal courts should have jurisdiction where the state courts stand ready and willing and were available (as here) "to allow full litigation of the constitutional claim," See Allen et al. v. McCurry, supra, at page B406-407:

> "To the extend that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in Monroe v. Pape, supra, the Court inferred that

> Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176." (Our emphasis.)

In other words, it can no longer be claimed that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, at page B409-410:

> "The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself."

Amicus contends that under the rational expressed by this Court in Allen et al. v.

McCurry, supra, it clearly was not the intention of Congress in 1871 to establish concurrent jurisdiction in the federal court over all municipal contracts wherein one of the contracting parties claims a constitutional tort in the execution of that governmental contract. Particularly is that so, in this case, where the state court has shown a willingness to protect federal rights. Fact Concerts, Inc. made use of the State judicial system on Aug. 30th and obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned. There is no reason to believe the state judiciary would not give Fact Concerts, Inc. a full and fair opportunity to litigate the federal claim in a state court action regarding any breach of contract.

Fact Concerts, Inc. cannot rely upon Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, which is distinguishable. Southeastern Promotions, Ltd., supra, was a "prior restraint" case in which the plaintiffs

were denied a license and the opportunity to perform. Here, "Blood, Sweat and Tears" was granted the licence and did perform. The only "real" dispute was as to the rights of the respective parties under the municipal contract.

(B) The Public Policy Expressed In Owen v. City Of Independence, Mo., Precludes An Award Of Punitive Damages Against Local Public Entities Under 42 U.S.C. Section 1983.

The decision of this Court in Owen v. City of Independence, Mo., ___ U.S. ___, 63 L.Ed.2d 673, 100 S.Ct. ____ (April 16, 1980) which radically revised the rule of law re liability accruing as a result of governmental action, precludes the granting of an award of punitive damages against municipalities under 42 U.S.C. § 1983. In summarizing its holding in the concluding paragraph of the majority opinion in Owen, the Court noted that there are three "principals" in the scenario of the § 1983 cause of action:

(1) the victim of the constitutional deprivation;
(2) the officer whose conduct caused the injury; and
(3) the public, as represented by the municipal entity.

In considering what damages under a § 1983 cause of action may be recovered by the victim, and what damages are appropriately chargeable to the populace as a whole, as represented by the municipal entity, the court, at page 697, limited the victim's recovery to compensatory damages, and expressly stated that the public would be forced to bear only the costs of the injury inflicted:

> "We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy'. Monell v. New York City Dept., of Social Services,

436 U.S., at 695, 56 L.Ed.2d 611, 98 S.Ct. 2018." (Our emphasis.)

(C) Under Board Of Regents Of The University Of New York v. Tomanio And 42 U.S.C., § 1988, This Court May Not Disregard The Law In Those States Which Prohibits An Award Of Punitive Damages Against A Public Entity.

Representative of the law in several states, California Government Code section 818 provides:

> "§ 818. Absence of liability for exemplary and punitive damages. Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

In Board of Regents of the University of the State of New York et al., v. Tomanio, ___ U.S. ___, 64 L.Ed.2d 440, 100 S.Ct. ___ (May 19, 1980) this Court construed 42 U.S.C. § 1988 as requiring the application of state law where federal law provides no rule of decision for actions brought under 42 U.S.C. § 1983, unless they are "inconsistent" with federal law; at page 447:

"In § 1988, Congress 'quite clearly

> instructs (federal courts) to refer to state statutes' when federal law provides no rule of decision for actions brought under § 1983. Robertson v. Wegmann, 436 U.S. 584 (1978). See also Carlson v. Green, ___ U.S. ___, ___, ___, at n. 10 (1980). As we held in Robertson, by its terms, § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and the laws of the United States.'" (Our emphasis.)

Policies of "federalism" are advanced when the federal government recognizes the sovereign rights of a state and a state governmental policy which denies punitive damages in such circumstances.

(C)(1) To Permit A Federal Court To Award Punitive Damages Against A Municipality In The Execution Of Its Governmental Contracts, In Those States Where State Law Specifically Prohibits Punitive Damages Generally, Would Violate The Basic Principles Of State Sovereignty Which Are Embodied In The Eleventh Amendment To The Federal Constitution.

Under the doctrine of sovereign immunity, the U.S. District Court has no jurisdiction over a suit in law or equity by a citizen against the sovereign power of an unconsenting State. Hans v. Louisiana, 134 U.S. 1, 33 L.Ed.2d 42, 10

S.Ct. 504, Parden v. Terminal, R.Co, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207; Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614. For the same reason, an award of punitive damages against a governmental subdivision of the State in the execution of its governmental contracts which conflicts with the State's public policy re punitive damages would violate those same principles of state sovereignty. Compare State of Nevada v. Hall, 440 U.S. 410, 59 L.Ed.2d 416, 99 S.Ct. 1182 (March 5, 1979), where this Court held in a conflict of laws situation, that the Eleventh Amendment does not require that the sovereign immunity expressed in Nevada law be applied by the State of California in a tort action arising out of an automobile accident occuring in the State of California.

It should be noted that six states (Connecticut, Massachusetts, New Hampshire, Colorado, Louisiana, and Washington) do not

permit an award of punitive damages in civil cases. Rosener v. Sears Roebuck and Co., 110 Cal.App.3d 740, 168 Cal.Rptr. 237 at 251. See, also, the federal problem regarding punitive damages expressed in the dissent of Justice Hoffman in Snepp v. U.S., 595 F.2d 926 at 939 et seq.; reversed in Snepp v. U.S., ___ U.S. ___, 62 L.Ed.2d 704, 100 S.Ct. ____ (Feb. 19, 1980).

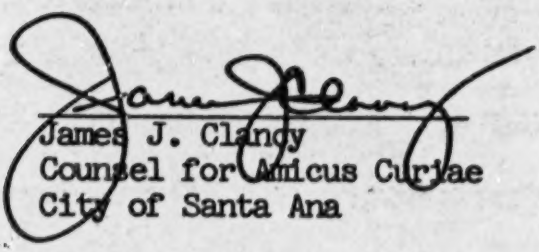
## CONCLUSION

Plaintiffs have failed to plead or prove a constitutional claim upon which independent federal relief can be based. The alleged constitutional deprivation was "subordinate" and "pendent" to the contract claim and should have been presented to the Rhode Island State Court, which had jurisdiction of the contract claim.

For all of the foregoing reasons, the judgment of the court below should be reversed and the cause remanded with instructions that the case be dismissed.

DATED: February 20, 1981

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, hereby certify that on this 20th day of February 1981, the original and 40 copies of the within Amicus Curiae Brief were deposited in the United States Post Office in Sun Valley, California, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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THE CITY OF NEWPORT, MAYOR HUMPHREY J. DONNELLY III, Individually and in His Office Capacity as Mayor, THE CITY COUNCIL for the City of Newport and LAWRENCE NEWSOME, JOHN H. WEST, ROBERT O. BEATTIE, RAYMOND H. CARR, EDWARD K. CORISTINE, JAMES F. RING, All individually and in their Official Capacity as Members of the City Council for the City of Newport, Rhode Island,

*Petitioners,*

v.

FACT CONCERTS, INC. AND MARVIN LERMAN,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## BRIEF OF STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, CONNECTICUT, HAWAII, INDIANA, MINNESOTA, MONTANA, NORTH CAROLINA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, WEST VIRGINIA, AND WYOMING, AND NATIONAL LEAGUE OF CITIES AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF INTEREST OF AMICI CURIAE | 2 |
| ISSUE | 2 |
| ARGUMENT | 2 |
| I. THIS COURT SHOULD DECIDE THE IMPORTANT ISSUE OF PUNITIVE DAMAGES ON ITS MERITS, WITHOUT PLACING ONE SIDE AT A DISADVANTAGE BY IMPOSITION OF THE "PLAIN ERROR" STANDARD | 2 |
| II. THE CONSTRUCTION OF § 1983 MOST IN KEEPING WITH THE INTENT OF CONGRESS AND THE DECISIONS OF THE COURT IS ONE EXCLUDING THE RECOVERY OF PUNITIVE DAMAGES | 4 |
| III. THE ALLOWANCE OF PUNITIVE DAMAGES IN ACTIONS UNDER 42 U.S.C. § 1983 WOULD SERIOUSLY JEOPARDIZE THE SMOOTH WORKING OF OUR FEDERAL SYSTEM | 7 |
| CONCLUSION | 11 |

## TABLE OF CASES


| | Page |
|---|---|
| *Carey* v. *Piphus*, 435 U.S. 247 (1978) | *passim* |
| *Carlson* v. *Green*, 64 L.Ed.2d 15 (1980) | 4, 6, 7, 10 |
| *Maine* v. *Thiboutot*, 100 S.Ct. 2502 (1980) | 9 |
| *Mitchum* v. *Foster*, 407 U.S. 225 (1972) | 8 |
| *Monroe* v. *Pape*, 365 U.S. 167 (1961) | 9 |
| *Pridgin* v. *Wilkinson*, 296 F.2d 74 (10th Cir. 1961) | 3 |
| *Richmond F. & P.R. Co.* v. *Brooks*, 197 F.2d 404 (D.C. Cir. 1952) | 3 |
| *Wood* v. *Strickland*, 420 U.S. 308 (1975) | 10 |
| *Younger* v. *Harris*, 401 U.S. 37 (1971) | 7 |


## OTHER AUTHORITIES


| | |
|---|---|
| 25 C.J.S., Damages, § 117(1) (1966) | 9 |
| F.R.C.P. 51 | 3 |
| 42 U.S.C. § 1983 | *passim* |
| Durchslag, Federalism and Constitutional Remedies, 54 N.Y.U. L.Rev. 723 (1979) | 10 |
| Schnapper, Civil Rights Litigation After Morrell, 79 Colum. L.Rev. 213 (1979) | 10 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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No. 80-396

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THE CITY OF NEWPORT, MAYOR HUMPHREY J. DONNELLY III, Individually and in His Office Capacity as Mayor, THE CITY COUNCIL for the City of Newport and LAWRENCE NEWSOME, JOHN H. WEST, ROBERT O. BEATTIE, RAYMOND H. CARR, EDWARD K. CORISTINE, JAMES F. RING, All individually and in their Official Capacity as Members of the City Council for the City of Newport, Rhode Island, *Petitioners*,

v.

FACT CONCERTS, INC. AND MARVIN LERMAN, *Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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**BRIEF OF STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, CONNECTICUT, HAWAII, INDIANA, MINNESOTA, MONTANA, NORTH CAROLINA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, WEST VIRGINIA, AND WYOMING, AND NATIONAL LEAGUE OF CITIES AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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## STATEMENT OF INTEREST OF AMICI CURIAE

There is not a state in the Union which has not been the target of an action brought under 42 U.S.C. § 1983. The financial strain visited upon state treasuries by these suits is already overwhelming. If, now, the recovery of punitive damages is also to be allowed under § 1983, the impact on the states' balance sheets may be close to devastating. The amici states thus have a vital interest in arguing that a recovery under § 1983 should not include the award of punitive damages. The National League of Cities and National Association of Counties are non-profit associations of elected and appointed public officials at the municipal and county level, which join this brief with the consent of the petitioners and respondents.

## ISSUE

In addition to full compensatory damages and attorneys fees, may punitive damages as well be imposed upon local governmental units in actions under 42 U.S.C. § 1983, when such punitive damages serve no deterrent purpose?

## ARGUMENT

### I. THIS COURT SHOULD DECIDE THE IMPORTANT ISSUE OF PUNITIVE DAMAGES ON ITS MERITS, WITHOUT PLACING ONE SIDE AT A DISADVANTAGE BY IMPOSITION OF THE "PLAIN ERROR" STANDARD.

The question of whether punitive damages are recoverable in a § 1983 action is one of potentially critical importance to the smooth functioning of the federal system. The development of a just and coherent body of law demands that an issue of such note be decided squarely on its merits, without the deck stacked in favor of one side through imposition of the "plain error" standard used by the Court of Appeals below. Granted, the City failed to object at trial to the punitive damages instruction to which it now assigns error. Granted, the pur-

pose behind the requirement of F.R.C.P. 51 that objections to instructions be raised at trial, the purpose of permitting the trial judge to evaluate the objection and correct his error, is a salutory one. It, however, may not be granted that the goal of avoiding an appeal which may, or may not, have been rendered unnecessary by an objection to an instruction is so momentous that it must be promoted even at the expense of deciding a crucial issue of law unswervingly on its merits. Such housekeeping ends may be promoted by less expensive means. The consequences of using the "plain error" standard in deciding this issue grow even more preposterous when it is realized that the threat of facing the stricter standard on appeal does not constitute much of an incentive to making timely objections in the first place. The overriding reason why counsel do make timely objections is to win at trial court. The threat of facing a "plain error" standard on appeal pales into oblivion beside the threat of an imminent loss. Finally, even if a timely objection to the instruction had been made at trial court, the purpose of requiring timely objections, that of avoiding unnecessary appeals, would still, in all likelihood, not have been served in this case, since the City has appealed on grounds independent of the awarding of punitive damages.

The administrative purposes served by penalizing the failure to object to instructions are minimal at best and are of far less import than is the end of rightly deciding a question of law, an end which lies at the heart of any system of justice. To handicap one side of the punitive damages issue by imposition of the plain error standard would be to sacrifice a square decision of a vital issue of law in the speculative interest of avoiding unnecessary appeals. This course must not be followed when the issue to be decided is of such consequence.[1]

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[1] Doctrinal support for our position may be found in *Pridgin* v. *Wilkinson*, 296 F.2d 74 (10th Cir. 1961), and *Richmond F. & P. R. Co.* v. *Brooks*, 197 F.2d 404 (D.C. Cir. 1952).

The determination of which standard of review to employ is normally an important threshold step in any appellant's decision. In this case, however, the determination is of somewhat less significance, since no matter what standard be employed, the force of law and policy remain constant: Punitive damages are not recoverable under § 1983.

## II. THE CONSTRUCTION OF § 1983 MOST IN KEEPING WITH THE INTENT OF CONGRESS AND THE DECISIONS OF THE COURT IS ONE EXCLUDING THE RECOVERY OF PUNITIVE DAMAGES.

This Court has not yet decided whether or not punitive damages are recoverable in a § 1983 action. *Carlson* v. *Green*, 64 L.Ed.2d 15, 42 (1980) (Rehnquist, J., dissenting). However, the proper role of damages in a § 1983 action, as outlined in *Carey* v. *Piphus*, 435 U.S. 247 (1978), suggests quite forcefully that punitive damages are not recoverable. The issue posed in *Carey* was whether a § 1983 plaintiff who had demonstrated that his rights of procedural due process had been violated had to prove actual injury by the deprivation before recovering substantial, nonpunitive damages. *Carey*, *supra*, at 253. In deciding that such a recovery was not available, the Court firmly established the *compensatory* nature of damages under § 1983. *Id.* at 254-56. Significantly, the Court left no doubt as to whether compensatory damages alone could fulfill the deterrent purpose of § 1983.

> ". . . To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. . . ." *Id.* at 256-57.

Punitive damages are not compensatory damages. Since deterrence is the reason for imposing punitive damages, this pronouncement seems quite plainly to say also that there is no evidence that Congress intended to make punitive damages a part of § 1983.

The conclusion that punitive damages have no place in a § 1983 recovery is buttressed by what the Court did in *Carey*, as well as what it said. As part of their argument that general, presumed damages may be recovered in a § 1983 action, the plaintiffs in *Carey* argued that the need to deter violations justified the recovery of such damages. *Id.* at 254. The Court apparently did not find this argument persuasive, since it denied the requested relief. If general, nonpunitive, compensatory damages are not necessary to deter violations, then surely the more extreme, more clearly deterring remedy of punitive damages could not be necessary to deter violations. And, if punitive damages are not needed as a deterrent or punishment, the very reason for imposing them vanishes.

Reliance on the dictum contained in footnote 11 of the *Carey* opinion, *id.* at 257, is misplaced. That footnote must be read against the background of these distinct signals in the body of the opinion indicating that punitive damages are not recoverable in a § 1983 action. In footnote 11, the Court stated:

> "This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights. [Citations omitted.] Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. . . ." *Id.* at 257.

This dictum must be taken for exactly what it is: An expression of the sound judicial policy of refraining from deciding questions not presented in the case or contro-

versy then before the tribunal. The footnote in no way dilutes the fact that the contours of a § 1983 recovery as developed in *Carey* leave no room for punitive damages.

It is unfortunate that the Court did not follow this same judicial policy in the subsequent case of *Carlson* v. *Green*, 64 L.Ed.2d 15 (1980). As the majority noted at the outset:

> "Two questions are presented for decision: (1) Is a remedy [for Eighth Amendment violations] available directly under the Constitution given that respondent's allegations could also support a suit against the United States under the Federal Tort Claims Act? and (2) . . ." *Id.* at 22.

The Court answered the first question in the affirmative, relying in part on an argument that a *Bivens*-type remedy would be more effective than a recovery under the Federal Tort Claims Act. A link in this argument was the holding that punitive damages are available in a *Bivens* suit, but not in an action under the Federal Tort Claims Act. The majority supported its conclusion that punitive damages are available in *Bivens* actions by remarking, almost offhandedly, that "[m]oreover, punitive damages are available in 'a proper' § 1983 action, *Carey* v. *Piphus*, 435 U.S. 247, 257, n.11 [1978] . . ." In this casual manner, as a remote, unneeded link in an argument concerning a *Bivens* action, an action which has no bearing on federal-state relations, the majority in *Carlson* apparently decided a question of the most critical importance to our federal system, without the question even being presented for decision. *See Carlson*, *supra*, at 6. Furthermore, this "decision" that punitive damages are available in a § 1983 action is apparently based entirely on footnote 11 in *Carey*, *supra*, a neutral dictum set in a case which otherwise signalled quite strongly that punitive damages were not available in a

§ 1983 action. Accord, *Carlson, supra,* at 42 (Rehnquist, J., dissenting).

An issue of as much import as the question of punitive damages in § 1983 actions must not be decided in as casual a fashion as was the case in *Carlson.* The offhand remark of the *Carlson* majority that punitive damages are available should not be considered dispositive of the issue. The considered description of the theory of § 1983 damages as set forth in *Carey,* a theory leaving no room for punitive damages, should be considered dispositive of the issue.

## III. THE ALLOWANCE OF PUNITIVE DAMAGES IN ACTIONS UNDER 42 U.S.C. § 1983 WOULD SERIOUSLY JEOPARDIZE THE SMOOTH WORKING OF OUR FEDERAL SYSTEM.

One of the central geniuses of our form of government is the delicate balance of powers between the national government and the various state governments. This system has been aptly described as one

> ". . . in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States . . . ." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

Our federalism, this respect for and deference to state functions and state sovereignty, ". . . occupies a highly important place in our Nation's history and its future." *Id.* at 45. It may well be that this "sensitivity to the legitimate interests of both State and National Governments" will prove to be our best defense against the Orwellian tendencies of large, overcentralized national

governments. Surely, our federalism has served us well thus far.

It little profits the political health of the nation to make sea-changes in the fragile balances of federalism without good reason to do so. The "vast transformation" in the concepts of federalism occasioned by the adoption of 42 U.S.C. 1983,[2] *see Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972), is an example of one such justified change in federal-state relations. In the turbulent years following the Civil War, many states were not providing effective protection of federally-secured rights. *Mitchum, supra*, at 240-41. The Congress deemed it necessary to interpose the federal courts between the states and the people in order to protect the people from unconstitutional action under color of state law. *Id.* at 240-42. Only after recognizing this compelling necessity did Congress pass § 1983 and set into motion the basic restructuring of federal-state relations its adoption entailed. Even that activist Congress recognized that tampering with the balances of our federal system was not to be undertaken lightly.

Not all momentous shifts in the equilibriums of federalism, however, take place with the suddenness of the adoption of the post-Civil War civil rights statutes. The past two decades, for instance, have seen a relentless expansion in the scope of the remedy afforded by § 1983, the cumulative effect of which is a definite shift in the balances of federal-state power. From a tool used largely to remedy and prevent deprivations of federal constitu-

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[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

tional rights by state officials, *see, e.g., Monroe* v. *Pape*, 365 U.S. 167 (1961), *rev'd*, 436 U.S. 658 (1978), § 1983 is now something very close to a general damage remedy available to anyone who alleges a state has withheld from them some federal benefit in violation of any federal statute. *See Maine* v. *Thiboutot*, 100 S.Ct. 2502 (1980). This expansion alone may not signal any great tremor in federal-state relations, but when taken together with the fact that the heretofore extraordinary remedy of attorneys fees is now available to a prevailing plaintiff in a § 1983 action, no matter what federal statute is relied on and no matter what court the plaintiff may litigate in, *Thiboutot, supra*, at 2507, the old Ku Klux Act has become something close to a Sword of Damocles poised over the financial arteries of already strapped state and local governments. Now, to this real threat to the very solvency of state and local governments, respondents would add the spectre of punitive damages.

Our federalism simply will not work if a vital, aggressive central government is paired off against state and local governments paralyzed by an inability to raise revenues even for the provision of the most basic governmental services. The awarding of punitive damages to a § 1983 plaintiff makes such malfunctions of federalism likely, not merely because it increases the expenditures which a state or local government must bear, but because it creates the near inevitability of massive awards against cities, towns and counties which will drive some of those unfortunate governmental units to the edge of receivership. A rule of law having such dire implications for our federal system should be adopted only if it serves an otherwise important purpose. The allowance of punitive damages in § 1983 actions does no such thing.

The purpose of punitive damages is to punish the offender and to deter unacceptable conduct. 25 C.J.S., Damages, § 117(1) (1966). The threat of liability un-

der the modern, expanded version of § 1983, without the possibility of punitive damages, already serves as a potent deterrent against the deprivation of federal rights. As this Court recently stated in *Carlson* v. *Green*, 64 L.Ed.2d 15, 25 (1980),[3] "[i]t is almost axiomatic that the threat of damages has a deterrent effect[.]" Even more specific was the *Carlson* Court in footnote 6, referring to the deterrent effect of a *Bivens* remedy: "42 U.S.C. 1983 serves similar [deterrent] purposes." Accord, Schnapper, Civil Rights Litigation After Morrell, 79 Colum. L.Rev. 213, 244 (1979). *See also Carey* v. *Piphus*, *supra*, on p. 6. The deterrent effect which the *Carlson* Court recognized already inheres in the awarding of compensatory damages is magnified considerably by the possibility of an award of attorneys fees, the possibility of criminal liability on the part of state and local officials, *see* 18 U.S.C. 242, and the possibility of personal liability on the part of officials acting in bad faith. *Wood* v. *Strickland*, 420 U.S. 308, 321-22 (1975).

If a state or local governmental official or body is not deterred from taking action which may deprive a citizen of federally protected rights by this imposing threat of multiple civil and criminal liability, the possibility of punitive damages is not going to make any difference. The addition of punitive damages will not deter any conduct not already deterred by the current contours of a § 1983 recovery. The addition of punitive damages may, on the other hand, have perilous consequences for the smooth working of the federal system. This Court "has consistently recognized federalism concerns in interpreting civil rights laws." Durchslag, Federalism and Constitutional Remedies, 54 N.Y.U. L.Rev. 723, 735 (1979). What minimal, speculative benefits the cause of individual rights might obtain from the allowance of punitive damages in § 1983 actions is not worth the potential havoc such damages could create in our federal system.

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[3] *See* p. 6, *supra*, for a more detailed discussion of this case.

## CONCLUSION

Punitive damages have no place in a recovery under § 1983. The portion of the judgment below relating to punitive damages should be reversed and the case remanded to the District Court with appropriate instructions.

Respectfully submitted,

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